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No. 14582

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

THE TIMES-MIRROR COMPANY, a corpora-
tion, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

FEB 15 1955

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	23
Appeal:	
Certificate of Clerk to Transcript of Record	
on	49
Designation of Record on (DC).....	46
Designation of Record on (Appellant's-	
USCA)	144
Designation of Record on (Appellee's-USCA)	145
Motion and Order for Extension of Time to	
Docket Cause on	47
Notice of	42
Statement of Points on (Appellant's-DC)...	43
Statement of Points on (Appellant's-USCA)	143
Certificate of Clerk to Transcript of Record...	49
Complaint	3
Exhibits A-B-C—Claims for Refund	10-20
Exhibits D-E-F—Notices of Disallowance.	20-22
Designation of Record:	
Appellant's (DC)	46
Appellant's (USCA)	144
Appellee's (USCA)	145

ii.

Findings of Fact and Conclusions of Law.....	33
Judgment	41
Minutes of Court, June 30, 1954—Order Judgment for Plaintiff	30
Motion and Order for Extension of Time to Docket Cause	47
Names and Addresses of Attorneys.....	1
Notice of Appeal	42
Objections to Proposed Findings of Fact, Defendant's	31
Pre-Trial Order, Plaintiff's Proposed.....	26
Statement of Points on Appeal:	
Appellant's (DC)	43
Appellant's (USCA)	143
Summons	22
Transcript of Proceedings and Testimony.....	50
Argument on Behalf of Plaintiff by Mr. Mackay	123
Argument on Behalf of Defendant by Mr. Wyshak	128
Witnesses:	
Bowers, Harry W.	
—direct	50
—cross	66
—redirect	81, 88
—recross	87

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Carraro, Romeo

—direct	88
—cross	91
—recalled, cross	109
—rebuttal, direct	121

Krauss, Edward C.

—direct	93
—cross	96

Macartney, Fred L.

—direct	97, 105
—recalled, direct	113
—cross	114
—redirect	120
—recross	121

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600 Federal Building,
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For Appellee:

MACKAY, MCGREGOR, REYNOLDS &
BENNION,
728 Pacific Mutual Building,
523 West Sixth Street,
Los Angeles 14, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 14760-C

THE TIMES-MIRROR COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF FEDERAL
EXCESS PROFITS TAXES AND INTER-
EST FOR THE CALENDAR YEARS 1943,
1944 AND 1945

Plaintiff complains of defendant and for cause of action alleges:

I.

This action arises under the Internal Revenue Laws of the United States, and particularly Sections 23(a) and 23(p) of the Internal Revenue Code.

II.

The plaintiff is a corporation incorporated under the laws of the State of California whose principal office is located at 202 West First Street, Los Angeles 53, California, within the Sixth Collection District of California and within the Southern Judicial District of California, Central Division.

III.

Defendant is a corporation sovereign and body politic. The taxes and interest for the recovery of

which this action is [2] brought were paid to and collected by Harry C. Westover, who at the time of such payment and collection was the duly appointed, qualified and acting Collector of Internal Revenue in and for said Sixth Collection District of the State of California. Said Harry C. Westover is not in office as Collector of Internal Revenue at the time this action is commenced.

IV.

No action upon the claims herein referred to, other than as herein set forth, has been taken before the Congress or any of the departments of the United States or in any court; no assignment or transfer of said claims has been made; the plaintiff is entitled to the amount herein claimed from the defendant; and there is no just credit or offset against said claims which is known to the plaintiff.

V.

The plaintiff is now engaged, and was so engaged during the taxable years here material and for many years prior thereto, in the business of gathering and disseminating the news of the day by the various media known to and customarily employed by the trade. During the calendar years 1943 and 1944 plaintiff incurred expenses in the amounts of \$40,000.00 and \$44,179.04, respectively, representing the cost of microfilming its old newspapers. Said amounts were deducted by the plaintiff on its federal income tax and excess profits tax returns for the respective years. By the Revenue Agent's report

dated February 17, 1948, the full amount of \$40,000.00 for the year 1943 was disallowed and \$36,830.48 of the 1944 deduction was disallowed upon the ground that said amounts should be capitalized and recovered through amortization or depreciation deductions over a 25-year period; and as a result thereof the plaintiff was allowed amortization deductions of \$1,792.70 for the year 1944 and \$3,073.22 for the year 1945. [3]

VI.

On its returns for the calendar year 1945 the plaintiff deducted the amount of \$24,446.50, representing the costs incurred by plaintiff under its pension plan of benefits purchased for employees who were in the military service. Upon an audit of said returns by the Internal Revenue Agent said deduction was disallowed and plaintiff was allowed instead amortization of one-tenth of said cost, or \$2,444.65 upon the theory that such expenditures were made for past service benefits.

VII.

During the years 1944 and 1945 plaintiff deducted the amounts of \$808.51 and \$858.75, respectively, representing current costs of its pension plan with respect to employees of the Southwest Co. It also deducted in each of those years the sum of \$57.25, representing the cost of benefits for employees of Southwest Co. who were in the military service, similar to the amount deducted under the preceding paragraph. Upon the audit of plaintiff's returns said deductions were disallowed in full for the rea-

son that the payments related to employees other than employees of the plaintiff.

VIII.

As a result of the foregoing and other disallowances, the Commissioner of Internal Revenue assessed additional excess profits taxes for the years 1943, 1944 and 1945, with interest thereon to October 21, 1949, against the plaintiff in the aggregate amount of \$121,955.10 as follows:

Year	Excess Profits Tax	Interest
1943.....	\$43,643.15	\$12,856.79
1944.....	36,058.87	8,027.79
1945.....	18,379.45	2,989.05

IX.

The additional excess profits taxes for the years 1943, 1944 and 1945, with interest thereon as set forth above, aggregating \$98,081.47 and \$23,873.63, respectively, were paid under protest by the plaintiff to Harry C. Westover as Collector of Internal Revenue on October 21, 1949.

X.

The expenses incurred during the calendar years 1943 and 1944, representing the costs of microfilming its newspapers, as heretofore alleged, were ordinary and necessary business expenses within the purview of Section 23(a) of the Internal Revenue Code, and the deductions taken by plaintiff on its returns for the years 1943 and 1944 should have been allowed in full. Plaintiff since its first

publication of the Los Angeles Times in 1881 has maintained and does now maintain two sets of bound editions of its printed newspapers, one set for the use of plaintiff's employees and one set for the use of the public. On February 25, 1942, Japanese airplanes were reported to have flown over the Los Angeles area and to have been driven off by the anti-aircraft defenses of the City. Because of the widespread and imminent fear of bombings during the war, which might destroy plaintiff's old records, plaintiff undertook to have its old newspapers microfilmed and copies of such microfilm placed in various places so that if a bomb did destroy its plant it would have available copies of its old newspapers. Said expenditures did not improve or better any facility used in plaintiff's business, nor did it extend or prolong the useful life of any such facility. In the event that this Court should sustain the Commissioner of Internal Revenue in his disallowance of said expenditures, plaintiff alleges that the amortization deduction should be spread over a 10-year period instead of a 25-year period as recommended by the Commissioner of Internal Revenue. [5]

XI.

The full amounts representing the costs of plaintiff's pension plan of benefits purchased for its employees who were in military service were properly deductible on its return for the year 1945. Said payments were not a cost of past service benefits as that phrase is used under Section 23(p) of the Internal Revenue Code. Said payments involved no

past service at all on the part of the returning employees but were expended by the plaintiff in line with the worthy national policy of extending to returning servicemen benefits to which they currently would have become entitled if they had not served in the armed forces. Hence, the amounts were fully deductible as current costs of the plan. In the alternative, said amounts were deductible as an ordinary and necessary business expense under Section 23(a) of the Internal Revenue Code. The deductions taken by the plaintiff as alleged in paragraph VII, representing current costs of the pension plan with respect to employees of the Southwest Co., are deductible under Section 23(p) of the Internal Revenue Code inasmuch as the pension plan, which expressly covered employees of the plaintiff's wholly-owned subsidiary, was formally approved by the Commissioner of Internal Revenue. The services of such employees inured to the benefit of plaintiff; and hence the cost of covering them under plaintiff's pension plan was deductible under the provisions of the Internal Revenue Code and in any event was deductible as an ordinary and necessary business expense.

XII.

Plaintiff is informed and believes, and alleges upon such information and belief, that the deductions taken on its returns for the taxable years here involved were properly allowable under the Internal Revenue Code. The action of the Commissioner in disallowing such deductions was erroneous

and illegal. As a result thereof the plaintiff has overpaid its excess profits tax [6] liability for the years 1943, 1944 and 1945 by the amounts of \$32,400.00, \$30,697.52 and \$23,536.17, respectively, and has overpaid interest thereon in the respective amounts of \$9,544.68, \$6,834.19 and \$2,989.05. Plaintiff is entitled to recover the amount of said overpayments, aggregating \$106,001.61, together with interest thereon from the dates of said overpayments as provided by law.

XIII.

On January 26, 1950, plaintiff filed with the Collector of Internal Revenue at Los Angeles, California, three claims for refund (one for each of the taxable years 1943, 1944 and 1945) of the overpayment of excess profits taxes and interest in the amounts set forth in paragraph XII upon the grounds and facts set forth hereinabove. True and correct copies of said claims for refund are attached hereto, made a part hereof and marked Exhibits A, B and C, respectively. On June 27, 1952, the Commissioner of Internal Revenue issued three statutory notices of disallowance of plaintiff's said claims for refund (one for each taxable year), true and correct copies of which are attached hereto, made a part hereof and marked Exhibits D, E and F, respectively.

XIV.

As a result of all the foregoing, plaintiff has overpaid its federal excess profits tax liability and in-

terest thereon for the years 1943, 1944 and 1945 in the amounts alleged in paragraph XII; said overpayments have not been refunded or credited to plaintiff; the whole is now due and owing to plaintiff, and the Commissioner of Internal Revenue has erroneously and illegally failed and refused to allow the plaintiff's claims for refund and to refund to plaintiff the sums erroneously overpaid.

Wherefore, plaintiff prays for judgment against the defendant in the amount of \$106,001.61, together with interest [7] thereon as provided by law, and for such other and further relief, including costs, as the Court may deem just and proper in the premises.

Dated November 19, 1952.

MACKAY, McGREGOR, REYNOLDS
& BENNION,

/s/ By A. CALDER MACKAY,

/s/ By ADAM Y. BENNION,

Attorneys for Plaintiff

[8]

Duly Verified. [9]

EXHIBIT A

Form 843 Treasury Department Internal Revenue
Service (Revised July 1947)

Claim

To be filed with the Collector where assessment
was made or tax paid.

The Collector will indicate in the block below the

kind of claim filed, and fill in the certificate on the reverse.

[x] Refund of Taxes Illegally, Erroneously,
or Excessively Collected.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The
Times-Mirror Company.

Business address: 202 West First Street, Los Angeles 53, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed:
Sixth, California.

2. Period from 1-1, 1943, to 12-31, 1943.

3. Character of assessment or tax: Excess profits tax.

4. Amount of assessment: \$1,593,962.26; dates of payment October 21, 1949 (last payment).

* * * * *

6. Amount to be refunded: plus interest provided by law, \$41,944.68.*

* * * * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1950.

The deponent verily believes that this claim should be allowed for the following reasons: See Statement Attached.

representing the cost of two positive prints which were donated to the Huntington Library and the Los Angeles Public Library.

The taxpayer claims that the entire expenditures represented ordinary and necessary business expense and that the deductions taken on the returns for 1943 and 1944 should have been allowed in full.

The taxpayer has always maintained and does now maintain two sets of bound editions of its printed newspapers, one set for the use of the taxpayer's employees and one set for the use of the public. In the taxpayer's day-to-day work the old newspaper files are still used rather than the microfilms. The microfilms have not been used and are not now being used. The newspapers were microfilmed not in order to save [11] space, as is evident from the continued use of the newspapers themselves. The taxpayer's old newspaper files are not deteriorating materially, and microfilming was not done to preserve them from deterioration. The expenditure in question did not improve or better any facility used in the taxpayer's business, nor did it extend or prolong the useful life of any such facility. It was an ordinary and necessary business expense, deductible as such.

2. In the alternative, the amortization deductions should be spread over a ten-year period instead of a twenty-five year period.

3. On its returns for the year 1945 the taxpayer deducted the sum of \$24,446.50, representing the cost under the taxpayer's pension plan of benefits

purchased for employees who were in the military service. Upon the audit of its returns for said year only 10% of such costs, or \$2,444.65, was allowed as a deduction, upon the theory that such expenditure was made to purchase past service benefits, and the balance of the deduction, or \$22,001.85, was disallowed.

The taxpayer claims that the full payment was properly deducted, upon the ground that the payment was not a cost of past service benefits as that phrase is used in the Internal Revenue Code. It involved no past service at all on the part of the returning employees, but was expended by the taxpayer in line with the worthy national policy of extending to returning servicemen benefits to which they currently would have become [12] entitled if they had not served in the armed forces. Hence, the taxpayer contends that the amount paid was fully deductible as a current cost of the plan. In the alternative, the taxpayer contends that the amount was deductible as an ordinary and necessary business expense.

During the years 1944 and 1945 the taxpayer deducted the amounts of \$808.51 and \$858.75, respectively, representing current costs of the pension plan with respect to employees of the Southwest Co. It also deducted in each of those years the sum of \$57.25, representing the cost of benefits for employees of Southwest Co. who were in the military service, similar to the amounts deducted under the preceding paragraph. Upon the audit of taxpayer's returns said deductions were disallowed, for the

reason that the payments related to employees other than employees of the taxpayer.

The taxpayer claims that the pension plan, which was formally approved by the Commissioner of Internal Revenue, expressly covers employees of the taxpayer's wholly-owned subsidiary. The services of such employees inure to the benefit of the taxpayer, and hence the cost of covering them under the taxpayer's pension plan is deductible under the provisions of the Internal Revenue Code, and in any event is deductible as an ordinary and necessary business expense.

4. By virtue of the foregoing disallowances, inter alia, the taxpayer on October 21, 1949 paid to the Collector of Internal Revenue for the Sixth District of California, at [13] Los Angeles, California, the following deficiencies in income tax and excess profits tax and interest thereon:

Year	Income		Excess	
	Tax	Interest	Profits Tax	Interest
1943	\$21,547.55	\$6,089.99	\$43,643.15	\$12,856.79
1944	1,355.02	301.67	36,058.87	8,027.79
1945			18,379.45	2,989.05

5. To the extent, if any, to which this claim for refund exceeds the deficiency for the same year, as stated in the preceding paragraph, the tax was paid by the taxpayer within three years prior to the execution of a waiver extending the statute of limitations, which waiver was executed within three years after the return was filed and which waiver, or an extension thereof, remains in effect at the present time.

6. Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due it by reason of the foregoing or on account of (a) any mistake in fact or in law made by itself or any officer, clerk or other employee of the United States Treasury Department in the preparation, amendment and/or adjustment of its said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the United States Treasury Department, (d) any repealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered. [14]

This is to certify that the undersigned prepared the foregoing claim for refund and that the statement of facts therein set forth is from information furnished by the taxpayer which the undersigned believe to be true.

/s/ A. Calder Mackay

/s/ Adam Y. Bennion

Attorneys for Taxpayer [15]

EXHIBIT B

Form 844 Treasury Department Internal Revenue
Service (Revised July 1947)

Claim

To be filed with the Collector where assessment was
made or tax paid.

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse.

[x] Refund of Taxes Illegally, Erroneously,
or Excessively Collected.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The
Times-Mirror Company.

Business address: 202 West First Street, Los An-
geles 53, California.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed:
Sixth, California.
2. Period from 1-1, 1944, to 12-31, 1944.
3. Character of assessment or tax: Excess profits
tax.
4. Amount of assessment: \$1,441,525.37; dates of
payment October 21, 1949 (last payment).

* * * * *

6. Amount to be refunded: Plus interest provided
by law, \$37,531.71.*

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1950.

The deponent verily believes that this claim should be allowed for the following reasons: See Statement Attached.

*Tax	\$34,108.36
Less post-war credit.....	3,410.84
	<hr/>
	\$30,697.52
Interest overpaid	6,834.19
	<hr/>
	\$37,531.71

/s/ The Times-Mirror Company
By H. W. Bowers, Treasurer

Subscribed and sworn to before me this 12th day of January, 1950.

[Seal] /s/ Mary Bonjean,
Notary Public [16]

[Printer's Note: The Statement which follows here is a duplicate of Statement set out at pages 12-16.]

EXHIBIT C

Form 843 Treasury Department Internal Revenue
Service (Revised July 1947)

Claim

To be filed with the Collector where assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

[x] Refund of Taxes Illegally, Erroneously,
or Excessively Collected.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The
Times-Mirror Company.

Business address: 202 West First Street, Los An-
geles, California.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed:
Sixth, California.
2. Period from 1-1, 1945, to 12-31, 1945.
3. Character of assessment or tax: Excess profits
tax.
4. Amount of assessment: \$808,388.48; dates of
payment October 21, 1949 (last payment).

* * * * *

6. Amount to be refunded: Plus interest provided
by law, \$26,525.22.*

* * * * *

8. The time within which this claim may be legally
filed expires, under section 322 of Internal Rev-
enue Code on December 31, 1950.

The deponent verily believes that this claim

should be allowed for the following reasons: See Statement Attached.

*Tax\$26,151.30

Less post-war credit 2,615.13

\$23,536.17

Interest overpaid 2,989.05

\$26,525.22

/s/ The Times-Mirror Company

By H. W. Bowers, Treasurer

Subscribed and sworn to before me this 12th day of January, 1950.

[Seal] /s/ Mary Bonjean,
Notary Public

[22]

[Printer's Note: The Statement which follows here is a duplicate of Statement set out at pages 12-16.]

EXHIBIT D

U. S. Treasury Department, Washington 25
Office of Commissioner of Internal Revenue—Address reply to Commissioner of Internal Revenue and refer to IT:CL:O:Rej

The Times-Mirror Company June 27, 1952
202 West First St., Los Angeles 53, California

In re: Claims for refund of \$20,522.08, \$41,944.68 for the year 1943.

Gentlemen:

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of

disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLarney,

Form 6917

Deputy Commissioner

[28]

EXHIBIT E

U. S. Treasury Department
Washington 25

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and Refer to IT:CL:O:Rej.

The Times-Mirror Company Jun 27 1952
202 West First Street, Los Angeles 53, Calif.

In re: Claims for refund of \$14,663.09, \$37,-
531.71 for the year 1944.

Gentlemen:

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLarney,

Form 6917

Deputy Commissioner

[29]

EXHIBIT F

U. S. Treasury Department
Washington 25

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and Refer to IT:CL:O:Rej.

The Times-Mirror Company Jun 27 1952
202 West First Street, Los Angeles 53, Calif.

In re: Claims for refund of \$11,011.07, \$26,-
525.22 for the year 1945.

Gentlemen:

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLarney,

Form 6917

Deputy Commissioner

[30]

[Endorsed]: Filed November 20, 1952.

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Mackay, McGregor, Reynolds & Bennion, plaintiff's attorneys, whose address is 728 Pacific

Mutual Building, 523 West Sixth Street, Los Angeles 14, California (Telephone MIchigan 5175) an answer to the complaint which herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: November 20, 1952.

[Seal] EDMUND L. SMITH,
 Clerk of Court
 /s/ L. CUNLIFFE,
 Deputy Clerk [31]

Return on Service of Writ attached. [32]

[Endorsed]: Filed November 26, 1952.

[Title of District Court and Cause.]

ANSWER

Now comes the defendant and answers the complaint filed herein as follows:

1. Admits the allegations contained in paragraph I of the complaint.
2. Admits the allegations contained in paragraph II of the complaint.
3. Admits the allegations contained in paragraph III of the complaint.
4. Admits the allegations contained in paragraph IV of the complaint except defendant denies that

the plaintiff is entitled to the amount claimed or to any amount from the defendant. [33]

5. Admits the allegations contained in paragraph V of the complaint.

6. Admits the allegations contained in paragraph VI of the complaint except defendant denies that the amount of \$24,446.50 deducted by plaintiff in its return was the actual contributions paid by plaintiff under its pension plan in the calendar year 1945.

7. Admits the allegations contained in paragraph VII of the complaint.

8. Admits the allegations contained in paragraph VIII of the complaint except defendant states that the amount of the excess profits tax assessment for the year 1943 was \$48,492.39 which was satisfied in the amount of \$4,849.24 by a post-war credit off-set making the aggregate amount assessed for the years 1943, 1944 and 1945 \$126,804.34.

9. Denies the allegations contained in paragraph IX of the complaint except defendant admits that the excess profits taxes for the years 1943, 1944 and 1945, with interest thereon, were paid or otherwise satisfied by plaintiff under protest on October 21, 1949.

10. Denies the allegations contained in paragraph X of the complaint.

11. Denies the allegations contained in paragraph XI of the complaint.

12. Denies the allegations contained in paragraph XII of the complaint. [34]

13. Denies the allegations contained in paragraph

XIII of the complaint except defendant admits that on January 26, 1950, plaintiff filed claims for refund for the taxable years 1943, 1944 and 1945 for the alleged overpayment of excess profits taxes and interest, and that on June 27, 1952, the Commissioner of Internal Revenue issued statutory notices of disallowance of plaintiff's claims for refund. Exhibits A, B, C, D, E and F, attached to the complaint, appear to be correct copies of the claims for refund as filed and the notices of disallowance.

14. Denies the allegations contained in paragraph XIV of the complaint except defendant admits that no part of the deficiencies in excess profits taxes assessed against plaintiff for the years 1943, 1944 and 1945 have been refunded or credited to plaintiff.

Wherefore having fully answered defendant demands that the complaint be dismissed with costs to the defendant.

WALTER S. BINNS,

United States Attorney

E. H. MITCHELL and

EDWARD R. McHALE,

Assistant U. S. Attorneys,

EUGENE HARPOLE,

Special Attorney, Bureau of the
Internal Revenue,

/s/ E. H. MITCHELL,

Attorneys for Defendant [35]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Filed April 23, 1953.

Civil Action No. 14759-WB

Civil Action No. 14760-WB

PLAINTIFF'S PROPOSED PRE-TRIAL ORDER

At a conference held under Rule 16, F.R.C.P., by direction of Wm. M. Byrne, Judge, the following admissions and agreements of fact were made by the parties and require no proof:

1. The plaintiff is a corporation organized under the laws of the State of California whose principal office is located at 202 West First Street, Los Angeles 53, California, within the Sixth Collection District of California and within the Southern Judicial District of California, Central Division.

2. The plaintiff is now engaged, and was so engaged during the taxable years here material (to wit, 1943 and 1944) and for many years prior thereto, in the business of gathering [37] and disseminating the news of the day by the various media known to and customarily employed by the trade. During the calendar years 1943 and 1944

plaintiff incurred expenses in the amounts of \$40,000.00 and \$44,179.04, respectively, representing the cost of microfilming its old newspapers. Said amounts were deducted by the plaintiff on its Federal income tax and excess profits tax returns for the respective years. By the Revenue Agent's report dated February 17, 1948, the full amount of \$40,000.00 for the year 1943 was disallowed and \$36,830.48 of the 1944 deduction was disallowed upon the ground that said amounts should be capitalized and recovered through amortization or depreciation deductions over a 25-year period; and as a result thereof the plaintiff was allowed amortization deductions of \$1,792.70 for the year 1944 and \$3,073.22 for the year 1945.

3. As a result of the foregoing and other disallowances, the Commissioner of Internal Revenue assessed additional excess profits taxes for the years 1943 and 1944, with interest thereon to October 21, 1949, against the plaintiff in the aggregate amount of \$100,586.60 as follows:

Year	Excess Profits Tax	Interest
1943	\$43,643.15	\$12,856.79
1944	36,058.87	8,027.79

4. Said additional excess profits tax and interest were paid under protest by the plaintiff to Harry C. Westover as Collector of Internal Revenue on October 21, 1949. Said Harry C. Westover was not in office as Collector of Internal Revenue at the time this action was commenced.

5. On January 26, 1950 plaintiff filed with the Collector of Internal Revenue at Los Angeles, Cali-

fornia, claims for refund of a portion of the additional excess profits taxes and interest paid by it as aforesaid, true and correct copies of which may be received in evidence herein as plaintiff's Exhibits 1 and 2 [38] respectively. On June 27, 1952, the Commissioner of Internal Revenue issued statutory notices of disallowance of said claims for refund, true and correct copies of which may be received in evidence herein as plaintiff's Exhibits 3 and 4 respectively.

6. Plaintiff and defendants reserve the right to introduce the testimony of a witness or witnesses as to the nature, purpose and effects of the expenditures in question.

7. The issue raised in the complaints with respect to deductibility of amounts contributed to plaintiff's pension plan in behalf of employees returning from the military services has been abandoned by plaintiff (see page 10 of Plaintiff's Pre-Trial Memorandum). This concession removes the principal issue with respect to the year 1946 in Docket No. 14759-WB and it also removes the principal issue with respect to the year 1945 in Docket No. 14760-WB. The principal issue remaining is whether the microfilming expenses incurred in 1943 and 1944 are properly deductible in those years. The alternative issue, referred to hereinafter, in the event plaintiff is unsuccessful on the principal issue, will affect the tax liability for the years 1945 and 1946 to the extent that there is a difference in amortization deductions as between ten years (contended for by plaintiff) and twenty-five

years (as determined by the Commissioner of Internal Revenue).

Issue of Fact and/or Law

1. Were the expenditures in question ordinary and necessary business expenses, or, on the other hand, were they capital expenditures?

Alternative Issue of Fact

1. In the event the court should hold that the expenditures in question were capital expenditures, then the alternative issue of fact to be tried is the length of the economic useful life of the asset acquired by such expenditures. [39]

The foregoing admissions of fact have been made by the parties in open court at the pre-trial conference; and issue of fact and/or law thereupon stated and agreed to, the court makes this Order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated February 26, 1954.

/s/ WM. M. BYRNE,

Judge of the U. S. District Court

The foregoing pre-trial Order is hereby approved:

Signed A. Calder Mackay, Adam Y. Bennion,
Attorneys for Plaintiff.

Laughlin E. Waters, U. S. Attorney; Edward
R. McHale, Asst. U. S. Attorney, Chief, Tax
Division; Robert H. Wyshak, Asst. U. S.
attorney; signed Robert H. Wyshak, Asst.
Attorneys for Defendant. [40]

[Endorsed]: Filed February 26, 1954.

[Title of Court and Causes No. 14,759-14,760.]

MINUTES OF THE COURT

Date: June 30, 1954. At Los Angeles, Calif.

Present. Hon. Wm. M. Byrne, District Judge;
Deputy Clerk: Edw. F. Drew; Reporter: None;
Counsel for Plaintiff: No appearance. Counsel for
Defendant: No appearance.

Proceedings: It is Ordered that judgment is
for plaintiff.

It Is Further Ordered that if the parties are in
agreement as to computations, counsel for plaintiff
is directed to prepare and submit findings of fact
and conclusions of law and judgment. And, if not in
agreement, the parties are directed to submit com-
putations in accordance with Local Rule 7(h).

Counsel notified.

EDMUND L. SMITH,

Clerk

/s/ By EDW. F. DREW,

Deputy Clerk

[41]

[Title of District Court and Cause No. 14,760.]

DEFENDANT'S OBJECTIONS TO PROPOSED FINDINGS OF FACT

Defendant objects to certain of the plaintiff's proposed Findings of Fact as not being supported by the evidence:

I.

The second sentence of paragraph V, beginning on page 3, line 27:

"Because of the fear of a bombing, discussions were commenced the following day between the then Treasurer, Secretary and Comptroller of plaintiff and his then assistant (the present Treasurer and Comptroller) looking to the protection of plaintiff's newspaper files, and from those discussions evolved the determination to microfilm the newspapers."

It is submitted that this sentence does not state the gist of the testimony in this regard and at the same time creates an undue inference. This testimony, which was admitted over a materiality and relevancy objection by the defendant, shows that the discussions between the witness, the then Assistant Treasurer, and the Treasurer were merely on an informal, conversational level. The witness testified that he did not engage in any discussions regarding microfilming with the person or persons who decided to have the microfilming done and that he did [42] not know of his own personal knowledge what the decision was based on.

II.

Paragraph VII: "Plaintiff has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is and has been allowed by the Commissioner of Internal Revenue as an ordinary and necessary business expense. Plaintiff also continues to bind two sets of its current newspapers."

This paragraph is immaterial and irrelevant to the issues raised by the pleadings. Furthermore, there is no evidence that the expense there referred to has been affirmatively allowed by the Commissioner of Internal Revenue.

III.

Paragraph IX: "The microfilming was not done to, nor did it, improve the original plant of the plaintiff, or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of the plaintiff. It was done solely as a means of protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense."

There is no competent evidence in the record to support the first three sentences of this paragraph.

The fourth sentence of this paragraph appears to be meaningless, since clearly an asset was created: the microfilm negative which was used in later years to provide additional institutions with copies of the microfilming.

The fifth sentence of this paragraph is a conclusion of law.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK,

Asst. U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for United States of
America

[43]

Affidavit of Service by Mail attached.

[44]

[Endorsed]: Filed July 26, 1954.

[Title of District Court and Cause No. 14760.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on June 17, 1954 before The Honorable William M. Byrne, Judge, presiding, without the intervention of a jury. Plaintiff was represented by its counsel, Mackay, McGregor, Reynolds & Bennion, through A. Calder Mackay and Adam Y. Bennion, and the defendant was represented by its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale and Robert H. Wyshak, Assistant United States Attorneys.

The Court having heard and considered all the evidence, and having considered the pre-trial order entered herein and the pleadings, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The plaintiff is a corporation organized under the laws of the State of California whose principal office is located [45] at 202 West First Street, Los Angeles 53, California, within the Sixth Collection District of California and within the Southern Judicial District of California, Central Division.

II.

The plaintiff is now engaged, and was so engaged during the taxable years here material (to wit, 1943 and 1944) and for many years prior thereto, in the business of gathering and disseminating the news of the day by the various media known to and customarily employed by the trade. During the calendar years 1943 and 1944 plaintiff incurred expenses in the amounts of \$40,000.00 and \$44,179.04, respectively, representing the cost of microfilming its old newspapers. Said amounts were deducted by the plaintiff on its Federal income tax and excess profits tax returns for the respective years. By the Revenue Agent's report dated February 17, 1948, the full amount of \$40,000.00 for the year 1943 was disallowed and \$36,830.48 of the 1944 deduction was disallowed upon the ground that said amounts should be capitalized and recovered through amor-

tization or depreciation deductions over a 25-year period; and as a result thereof the plaintiff was allowed an amortization deduction of \$1,792.70 for the year 1944. As a result of the foregoing and other disallowances, the Commissioner of Internal Revenue assessed additional excess profits taxes for the years 1943 and 1944, with interest thereon to October 21, 1949, against the plaintiff in the aggregate amount of \$100,586.60 as follows:

Year	Excess Profits Tax	Interest
1943.....	\$43,643.15	\$12,856.79
1944.....	36,058.87	8,027.79

said additional excess profits tax and interest were paid under protest by the plaintiff to Harry C. Westover as Collector of Internal Revenue on October 21, 1949. Said Harry C. Westover was not in office as Collector of Internal Revenue at the time [46] this action was commenced.

III.

On January 26, 1950 plaintiff filed with the Collector of Internal Revenue at Los Angeles, California, claims for refund of a portion of the additional excess profits taxes and interest paid by it as aforesaid. On June 27, 1952, the Commissioner of Internal Revenue issued statutory notices of disallowance of said claims for refund.

IV.

Since its first publication of the Los Angeles Times in 1881 plaintiff has maintained and does now maintain bound copies of its printed newspapers. For the period subsequent to 1910 plaintiff

has two sets of such bound editions, one of which is kept in a vault on the third floor of its building and is not used. The other set is kept in the same vault and is used by the plaintiff's officers and employees in the day-to-day operation of plaintiff's business and is also used by the public under the supervision of plaintiff's Chief Librarian. For the period prior to 1910 the plaintiff has only one set of the bound editions of its newspapers and for portions of the time prior to 1910 various of the bound volumes are missing. This was due to a bombing of plaintiff's plant and building in 1910, which also damaged certain of the volumes still on hand.

V.

On February 25, 1942, enemy aircraft were reported to have flown over the Los Angeles area and to have been driven off by anti-aircraft defenses. Because of the fear of a bombing, discussions were commenced the following day between the then Treasurer, Secretary and Comptroller of plaintiff and this then assistant (the present Treasurer and Comptroller) looking to the protection of plaintiff's newspaper files, and from those discussions evolved the determination to microfilm the newspapers. [47] Having determined to microfilm the newspapers, plaintiff made an effort to borrow some of the earlier issues which were missing in its library and it was able to borrow certain of such issues. The total microfilming done during 1943 and 1944 consisted of 850,579 pages, of which only 30,579 pages represented issues that

were borrowed for the purpose of microfilming. However, there are still several volumes of the newspapers which are missing and of which the plaintiff has no copies, either in the bound set or on microfilm.

VI.

A negative and three positive prints were made. One positive print was donated by plaintiff to the Los Angeles Public Library and another to the Huntington Memorial Library, San Marino, California. The third positive print is kept by plaintiff in the corridor outside the vault containing the bound volumes on the third floor of its building. The negative is kept in a vault on the fourth floor. The expense of the microfilming was charged on plaintiff's books as an expense; no asset or capital account was created.

VII.

Plaintiff has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is and has been allowed by the Commissioner of Internal Revenue as an ordinary and necessary business expense. Plaintiff also continues to bind two sets of its current newspapers.

VIII.

The microfilming of the newspapers was not done to conserve space, inasmuch as plaintiff has ample space in its present vault to accommodate two sets of its newspapers for a period of 40 to 60 years in the future, and it can then eliminate one set and

thus have sufficient space for some 80 to 100 years [48] in the future. Nor was the microfilming done to protect the plaintiff against deterioration of its bound volumes, to be used in lieu of the bound volumes, because deterioration is not rapid, particularly with respect to the set which is not used. The microfilm is never used by the plaintiff whenever there is a bound volume. It is resorted to from two to six times a year by the Chief Librarian of the Los Angeles Times to answer inquiries from the public regarding a period so long ago that plaintiff does not have a bound volume. It was used occasionally for two years by two members of plaintiff's editorial staff in preparing a column of what had appeared in the Times sixty years earlier, but this use occurred only when bound volumes were missing. Since 1950 the column was moved up to fifty years ago, and since bound volumes are available for all periods since 1910 the microfilm is no longer used for that purpose. The microfilm is difficult to read and cannot be used for long periods of time without resting. The photographing of the bound volumes makes reading difficult and at times impossible, because the binding was not broken and the material in the middle of the pages is not readable.

IX.

The microfilming was not done to, nor did it, improve the original plant of the plaintiff, or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of the plaintiff. It was done solely as a means of

protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense. [49]

Conclusions of Law

I.

The Court has jurisdiction of this action and of the parties thereto.

II.

The expense of microfilming plaintiff's newspapers was an ordinary and necessary expense incurred in its trade or business under Section 23(a)(1) of the Internal Revenue Code, and was not a capital expenditure.

III.

The plaintiff filed a duly executed claim for refund of excess profits tax overpaid by it for each of the calendar years 1943 and 1944 with the Collector of Internal Revenue within the period allowed therefor by Section 322(b) of the Internal Revenue Code, and said claims having been disallowed plaintiff duly commenced this action upon the facts and grounds set forth in said claims and within the period allowed therefor by Section 3772(a) of the Internal Revenue Code.

IV.

Plaintiff, the Times-Mirror Company, is entitled to judgment against defendant, United States of

America, for refund of excess profits tax and interest paid by it for the calendar years 1943 and 1944 in the following amounts, which amounts were paid by plaintiff on October 21, 1949:

	1943	1944
Excess Profits Tax.....	\$36,000.00	\$33,285.89
Minus 10% post-war refund credit	3,600.00	3,328.59
	<hr/>	<hr/>
Net Tax Refundable.....	\$32,400.00	\$29,957.30
Interest paid by plaintiff....	9,544.68	6,669.39
	<hr/>	<hr/>
Total.....	\$41,944.68	\$36,626.69

Said judgment shall bear interest at 6 per cent per annum from October 21, 1949.

Dated this 29th day of July, 1954.

/s/ WM. M. BYRNE,
United States District Judge

Disapproved as to form:

/s/ LAUGHLIN E. WATERS, U. S. Atty.

/s/ ROBERT H. WYSHAK, Asst. U. S. Atty.

[Endorsed]: Lodged July 23, 1954; Filed July 29, 1954. [51]

In the United States District Court for the Southern District of California, Central Division

Civil Action No. 14760-WB

THE TIMES-MIRROR COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause came on for hearing on June 17, 1954 before The Honorable William M. Byrne, Judge, presiding, without the intervention of a jury. Plaintiff was represented by its counsel, Mackay, McGregor, Reynolds & Bennion, through A. Calder Mackay and Adam Y. Bennion, and the defendant was represented by its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale and Robert H. Wyshak, Assistant United States Attorneys. The Court having made and filed its Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, The Times-Mirror Company, have and recover against the defendant, the United States of America, the sum of \$41,944.68 for the year 1943, with interest at the rate of six per cent per annum on said sum from October 21, 1949 to a date [53] preceding the issuance of the refund check by not more than 30 days; and that the

plaintiff, The Times-Mirror Company, have and recover against the defendant, the United States of America, the sum of \$36,626.69 for the year 1944, with interest at the rate of six per cent per annum from October 21, 1949 to a date preceding the issuance of the refund check by not more than 30 days, with no costs to either party.

Dated this 29th day of July, 1954.

/s/ WM. M. BYRNE,
United States District Judge

Approved as to form:

/s/ LAUGHLIN E. WATERS, U. S. Atty.

/s/ ROBERT H. WYSHAK, Asst. U. S. Atty.

[Endorsed]: Lodged July 23, 1954; Judgment
Filed and Entered July 29, 1954. [54]

[Title of District Court and Cause No. 14760.]

NOTICE OF APPEAL

To the above named Plaintiff and to its Attorneys,
Mackay, McGregor, Reynolds & Bennion, 728
Pacific Mutual Building, 523 West Sixth St.,
Los Angeles 14, California:

You, and Each of You, Are Hereby Advised that the defendant, United States of America, does hereby appeal to the Court of Appeals for the Ninth Circuit from the order for judgment of plaintiff entered June 30, 1954, and from the judgment en-

tered July 29, 1954, in the above entitled case.

Dated: This 26th day of August, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK,

Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant, United

States of America [56]

Affidavit of Service by Mail attached. [57]

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause No. 14760.]

APPELLANT'S STATEMENT OF POINTS

Pursuant to the provisions of Federal Rule of Civil Procedure 75(d), appellant hereby designates the following points upon which it intends to rely on its appeal, to-wit:

The Trial Court erred:

(1) In its finding V that—"Because of the fear of a bombing, discussions were commenced the following day between the then Treasurer, Secretary and Comptroller of plaintiff and his then assistant (the present Treasurer and Comptroller) looking to the protection of plaintiff's newspaper files, and

from those discussions evolved the determination to microfilm the newspapers.”

Said finding was clearly erroneous in that it was not [58] supported by competent evidence.

(2) In its finding VII that—“Plaintiff has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is and has been allowed by the Commissioner of Internal Revenue as an ordinary and necessary business expense. Plaintiff also continues to bind two sets of its current newspapers.”

Said finding is clearly erroneous and not supported by the evidence and is immaterial and irrelevant to the issues raised by the pleadings.

(3) In its finding IX that—“The microfilming was not done to, nor did it, improve the original plant of the plaintiff, or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of the plaintiff. It was done solely as a means of protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense.”

Said finding is clearly erroneous as there was no competent evidence in the record to support it.

(4) In holding in its conclusions of law, No. II, that the expense of microfilming plaintiff's newspapers was an ordinary and necessary expense incurred in its trade or business under Section 23

(a)(1) of the Internal Revenue Code, and was not a capital expenditure;

(5) In holding that the plaintiff-appellee, The Times-Mirror Company, was entitled to judgment against appellant, [59] United States of America, for refund of excess profits tax and interest paid by it for the calendar years 1943 and 1944;

(6) In entering judgment for the Times-Mirror Company for the resulting overpayment of excess profits tax and interest paid by it for the calendar years 1943 and 1944.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U. S. Attorney

Chief, Tax Division

ROBERT H. WYSHAK,

Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant-Appellant,

United States of America [60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause No. 14760.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, United States of America, designates the following portions of record, proceedings and evidence to be contained in the record on appeal to be transmitted to the Court of Appeals for the Ninth Circuit, which by order of Court, may be designated therein up to, and including, November 24, 1954:

1. Summons and Complaint, filed November 20, 1952;
2. Answer of Defendant, United States of America, filed April 23, 1953;
3. Plaintiff's Pre-Trial Order, filed February 26, 1954;
4. Minutes of the Court, dated June 30, 1954;
5. Findings of Fact and Conclusions of Law, dated and filed July 29, 1954;
6. Defendant's Objections to Proposed Findings of Fact, filed July 26, 1954;
7. Judgment, dated and filed July 29, 1954;
8. Notice of Appeal to the Court of Appeals for the Ninth Circuit, filed August 26, 1954; [62]
9. Motion for Extension of Time to Docket Cause on Appeal and Order, dated and filed September 28, 1954;
10. Appellant's Statement of Points to be Relied Upon on Appeal;

11. This Designation of Contents of Record on Appeal; and

12. Reporter's Transcript of Proceedings on June 17, 1954.

Dated: This 29th day of October, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U. S. Attorney,

Chief, Tax Division

ROBERT H. WYSHAK,

Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant-

Appellant

[63]

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause No. 14760.]

MOTION FOR EXTENSION OF TIME TO
DOCKET CAUSE ON APPEAL AND
ORDER

Comes Now the defendant-appellant, and moves the Court to extend the time to docket the cause on appeal 50 days under Federal Rule Civil Procedure 73(g) upon the grounds that the Attorney General of the United States has just decided to prosecute this appeal and additional time is neces-

sary within which to secure a transcript and prepare the designation of record on appeal.

Dated: September 28, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U. S. Attorney

Chief, Tax Division

ROBERT H. WYSHAK,

Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant-

Appellant

[64]

Order

Good Cause Appearing Therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 24th day of November, 1954.

Dated: September 28, 1954.

/s/ WM. M. BYRNE,

United States District Court

Presented by:

/s/ ROBERT H. WYSHAK,

Assistant United States Attorney [65]

[Endorsed]: Filed September 28, 1954.

[Title of District Court and Cause No. 14760.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, hereby certify that the foregoing pages numbered from 1 to 65, inclusive, contain the original Complaint; Summons; Answer; Pre-Trial Order; Defendant's Objections to Proposed Findings of Fact; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points to be Relied Upon on Appeal; Designation of Record on Appeal and Motion and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for June 30, 1954, which, together with the original exhibits and Reporter's Transcript of Proceedings on June 17, 1954, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 18th day of November, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

[Title of District Court and Causes No. 14759-60.]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Thursday, June 17, 1954

Honorable Wm. M. Byrne, Judge presiding. [1*]

* * * * *

HARRY W. BOWERS

called as a witness herein on behalf of the Plaintiff,
being first duly sworn, was examined and testified
as follows, to-wit: [8]

* * * * *

Direct Examination

Q. (By Mr. Mackay): Mr. Bowers, where do
you reside?

A. 521 North McCadden Place, Los Angeles.

Q. And have you been living at that place for
some time?

A. At that particular address, four years.

Q. And you have lived in Los Angeles a long
time before that, haven't you? A. 30 years.

Q. What is your occupation?

A. I am Treasurer and Comptroller of The
Times-Mirror Company.

Q. How long have you been Treasurer and
Comptroller of the Los Angeles Times-Mirror Com-
pany?

A. Since the 6th of January, 1946.

Q. 1946. Prior to that time, what was your occu-
pation? A. I was Auditor.

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of Harry W. Bowers.)

Q. How long had you been Auditor for the Times-Mirror? For the Times-Mirror, you mean?

A. For the Times-Mirror Company, yes, sir.

Q. How long had you been Auditor prior to that time? A. Since 1935 up to that time.

Q. What had been your experience prior to that time, Mr. Bowers?

A. I was trained in school in business administration, [9] part of which was accounting, the major portion of which was accounting and later I entered the field of public accounting and finally into private practice.

Q. To what extent were you in public accounting?

A. 3 years in Toledo, Ohio, and one year in Los Angeles.

Q. And were you by yourself or were you with a firm? A. I was with two national firms.

Q. Will you please give us the name of that company you were with in Ohio?

A. I was with Price Waterhouse or the predecessor of Lybrand, Ross & Montgomery, in Los Angeles, and Ernst & Ernst at Toledo, Ohio.

Q. Now, the record shows, Mr. Bowers, that the plaintiff, The Times-Mirror Company, in 1943 and 1944 expended the sums of \$40,000.00 and \$44,179.04, respectively, as the cost of microfilming its old newspapers. A. That is correct.

Q. Now, can you tell the court what portion of the total cost represented the cost of the negative

(Testimony of Harry W. Bowers.)

and what represented the cost of the three prints, the positive prints?

A. I will have to refresh my memory on that by looking at a memorandum.

Q. Yes, do so.

A. The total cost was \$84,179.04. The portion pertaining to the cost of the negatives was \$73,-156.19. The balance, [10] \$11,022.85 was for the 3 positive prints.

Q. Now, Mr. Bowers, prior to that time, did The Times-Mirror Company or had it kept a record of the daily and Sunday editions?

A. The practice of The Times was to make 2 records or 2 bound volumes monthly, of the current issues of the daily publications and Sundays.

Q. And in 1942 how many such bound editions did The Times-Mirror have?

A. How many?

Q. Yes, two sets?

A. They had two sets of most of the volumes.

There were some missing volumes in the early years of the publication of The Times.

Q. Do you remember what years were missing?

A. I can give you the dates of the issues that were missing.

Q. Yes.

A. Pardon me, until I get the note on it. The years missing: I will give this by years, 1884 is missing.

Q. Yes?

A. The years 1889 to 1893 are missing.

(Testimony of Harry W. Bowers.)

Q. These were missing in 1942?

A. 1889 to 1893, those years are missing. [11]

Q. O. K. A. And 1884.

Q. All right. Go ahead?

A. Now you are asking about the missing copies, Mr. Mackay.

Q. Yes.

A. Now, there are also in that particular classification, you might call it, instances where the records or the volumes are not in the best of condition. Do you want me to give that record too?

Q. Yes.

A. All right. Now, December 4, 1881 to December 31, 1882, some of the issues are watermarked and brittle; 1885, there was fire damage, the paper is brittle, bound by cord and the papers torn.

Mr. Wyshak: Would you repeat that, please?

The Witness: I beg your pardon?

Mr. Wyshak: Would you repeat your last statement? I didn't hear it.

A. I will read it entirely: In 1885 there was some of it fire damaged and paper brittle, and some of it bound by cord and some of the pages torn. That is 1885.

1886: That year the package is wrapped and bound by cord.

1887: June 1 to June 30th, the package is wrapped and tied with a string. That is a condition of the file. [12] Now, June 1 to December 31st of that year, they were tied together with strings and binding loose and they come apart.

(Testimony of Harry W. Bowers.)

1888: In fairly good condition, paper is brittle and tearing.

Now, that is the record of the condition of our early files. After that, they were in very good condition.

Q. Do you know what caused the water damage and the other damage that you have spoken about?

A. Well, from my observation and examination, that fire and water condition is due to the bombing of 1910, a result of the bombing of 1910.

The Court: Mr. Mackay, I just want to make **this statement** in connection with your interrogation. Ordinarily in this court we use the lectern. I wasn't going to say anything and see if we could get by this morning without its use so you could sit there at counsel's table, but immediately you will see the difference, the reason that we use it, because otherwise the witness naturally drops his voice and talks to the person who is interrogating him, so when you are sitting there he drops his voice and other counsel can't hear it over there.

Mr. Mackay: I understand.

The Court: When you use the lectern, the witness speaks to you and keeps his voice up so everyone can hear him.

Mr. Mackay: I think that is a good idea, your Honor.

The Court: And that is the only reason I require its use. [13]

Q. When did you say the bombing took place? In 1910, was it? A. October 1, 1910.

(Testimony of Harry W. Bowers.)

Mr. Mackay: There is no question about that.

Q. Now, I will ask you, Mr. Bowers, since The Times-Mirror Company had two sets of its old records except the ones you said were missing, why it was decided to microfilm its old issues?

Mr. Wyshak: Your Honor, I object to that question as not the best evidence and not competent evidence of a fact of what the Corporation intended or why it did this.

The Court: Objection overruled.

The Witness: To get that clear, I would like to have that question.

Mr. Mackay: Will you please read the question, Mr. Reporter?

(Pending question read as above recorded.)

The Witness: If I may, I would like to start with what created this expenditure.

Mr. Mackay: Go ahead.

A. On the morning of February 25th, which is the date of that issue there (indicating), I came into the office, and my predecessor Mr. Downing, who was the only member I believe or employee that was then living that went through the 1910 bombing, had experience of what that type of activity [14] would do to your records, and we were discussing the probable results if one of those bombs should happen to be dropped upon our building. And I might add here, if I may, that while I slept through that, that night, I didn't hear any of it, nevertheless, when I got up in the morning and read about it, it was a concern of practically

(Testimony of Harry W. Bowers.)

anybody to talk about. And Mr. Downing got to discussing it and I brought up the question: Supposing one of the bombs or two or more dropped on our building and destroyed it, if our building was destroyed, if our equipment was destroyed, if our inventory was destroyed, we would undoubtedly come out with a paper the next day, but, if our back issues were destroyed, that is something that couldn't be replaced.

Q. Now, may I call your attention to this: Is this an issue of the Los Angeles Times gotten out upon Wednesday morning, February 25, 1942?

A. That is a photostatic copy of one of our file copies.

Q. That is. And is this (Indicating) also a photostatic copy of one of your file copies, dated February 26th, 1942?

A. That is.

Mr. Mackay: If the Court please, I should like to offer these in evidence; the first one here being dated February 25, 1942, as the first exhibit.

The Court: It will be received. [15]

(Said copy of Los Angeles Times issue dated February 25, 1942, was received in evidence and marked as Plaintiff's Exhibit No. 1.)

The Clerk: Exhibit 1.

Mr. Mackay: And the next one as the second exhibit.

The Court: It will be received.

(Said copy of Los Angeles Times issue dated February 26, 1942, was received in evidence and marked as Plaintiff's Exhibit No. 2.)

(Testimony of Harry W. Bowers.)

The Clerk: The issue of February 25th is Exhibit 1 and the issue of February 26th is Exhibit 2.

Mr. Mackay: I have another one from the Los Angeles Examiner which I should like to offer. I appreciate that it is somewhat cumulative, but it does show anyway that it was universally thought that we had a bombing and it scared everyone in this city. I would like to offer this in evidence.

The Court: It may be received.

The Clerk: Exhibit 3.

(Said copy of a page of the Los Angeles Examiner issue dated February 25, 1942, was received in evidence and marked as Plaintiff's Exhibit 3.)

Mr. Wyshak: What was the date of that one?

The Clerk: That is February 25, 1942.

Q. (By Mr. Mackay): Now, Mr. Bowers, do I understand your [16] testimony that it was because of the general alarm about an air raid at Los Angeles at that time, you decided to microfilm your old past issues?

A. Due to that warning, the danger was discussed and from that it resulted eventually in the contract of having the back issues microfilmed.

Q. And then you did go ahead, you had the microfilming done and you had the negatives developed?

A. Yes, that is right, and we had 3 prints made.

Q. And where did you put the negative films?

(Testimony of Harry W. Bowers.)

A. The negative films are lodged in the Treasurer's safe in the Times-Mirror.

Q. On what floor?

A. On the 4th floor.

Q. Did you also have some positive prints made from the negatives?

A. We had 3 made. One is lodged in the editorial department on the 3rd floor of The Times Building outside of their vaults, one set is lodged with the Los Angeles Public Library, and one with the Huntington Library.

Q. Will you tell the Court why you lodged a copy of the positive prints in the Public Library and a copy in the Huntington Library?

A. It was mainly to spread the copies. If our building was destroyed, we would take the chance that perhaps one [17] copy would be preserved at the Public Library or maybe at the Huntington Library. That was further east from the coast, so we lodged one out there.

Q. Did the Public Library or the Huntington Library pay The Times-Mirror anything for the positive prints? A. No. They did not.

Q. They didn't. After you had procured the negative and your 3 positive prints, did you dispense with any of the old bound issues you say you had in two sets?

A. No. We have not.

Q. You have kept them just the same?

A. We kept them and continued to use them as we had before.

(Testimony of Harry W. Bowers.)

Q. Was this microfilming done for the purpose of conserving or preserving space?

A. No. It was not.

Q. In other words, you kept your old records just the same, in 2 sets?

A. We maintained the procedure, that is of making 2 sets.

Q. How big a space does the negative film occupy, approximately?

A. The negatives are stored in different places so they had to take about the same sized place. The dimensions of the cabinet holding the positive prints: One of them is lodged down in the editorial department. [18] The size of that film is $4\frac{1}{2}$ feet by $5\frac{1}{2}$ feet by $2\frac{1}{2}$ feet. I would judge that about $\frac{2}{3}$ of that space is now occupied with the film and that would prevail in the vault. They are the same size. That is in the Treasurer's vault, I mean.

Q. Well, was the space at that time which was occupied by these two other sets of your old issues crowded, did you need more space at that time?

Mr. Wyshak: Your Honor, I object to this line of questioning, as he has been leading the witness.

Mr. Mackay: I don't intend to lead the witness, but I think that is proper examination.

The Court: Objection overruled.

The Witness: Now, what was the question, please?

(Pending question read by the reporter.)

The Witness: Now, I want to make it clear, Mr.

(Testimony of Harry W. Bowers.)

Mackay, that I answered the question as to the space occupied by the film. Now, your question pertains to the back issues, I take it?

Mr. Mackay: That is right.

A. All right. No; the space was not nearly fully occupied.

Q. Have you estimated how long, how many more years you have before you utilize that space?

A. We have made a study of that. I would like to again [19] refer to the notes on that question.

Mr. Wyshak: Are these Mr. Bowers' notes?

Mr. Mackay: Yes.

The Witness: These are my notes, that is right. First, I will state the size of this space. I am referring to the vault that holds these back issues.

Mr. Mackay: Yes.

The Witness: It is a concrete vault and it is 26 feet by 38 by 10 feet. Now, approximately 60 per cent of that space is now holding 72 years of editions, that is, from 1881 to 1953.

Now, in my opinion we have enough space to take care of our needs for 40 to 60 years, at the present size of the paper today.

We have another avenue of increasing space, should it come about, and that is we could in the future, if we want to, eliminate one of the bound volumes. For all practical purposes we could still have a bound volume; and we have enough space there under our present practice to last for from 80 to 100 years.

Q. (By Mr. Mackay): Mr. Bowers, do you know

(Testimony of Harry W. Bowers.)

whether or not the bound volumes, the two sets of bound volumes you have talked about, have been used since you had your microfilming done?

The Witness: Have the bound volumes been used? [20]

Mr. Mackay: Yes.

A. Yes. They are used continuously, or daily I should say.

Q. And they have been ever since?

A. One edition of the bound volumes is used, that is correct.

Q. And what happens to the other edition?

A. The other edition is not used. It is filed, put away and not used.

Q. Is it sealed and wrapped up?

A. It is bound.

Q. Bound? A. Bound.

Q. Well, have the bound volumes been used any less because of the microfilming? A. No.

Q. Since the microfilming was done?

A. No; they have not. For whatever the demands are today, the same as they were prior to the filming they are still used.

Q. Well, to what extent have the positive prints, the microfilm and the positive prints been used since the print was made?

A. Well, I have been down there myself. I have talked to the custodian in charge of the film and the back issues, [21] and I have talked to the Editorial——

(Testimony of Harry W. Bowers.)

Mr. Wyshak: Your Honor, I object to this answer on the ground that it is hearsay.

The Court: It is not responsive, counsel. The objection is sustained.

Q. (By Mr. Mackay—Continuing): Do you know to what extent, of your own knowledge?

The Court: Would you rather have the question read back to him?

Mr. Mackay: Yes, I would. Will you read the question, Mr. Reporter, please.

(Pending question read by the reporter.)

Mr. Mackay: Will you answer the question, please.

The Witness: Been used?

Mr. Mackay: Yes.

A. All right. As I said a little while ago, I investigated and checked on that.

Mr. Wyshak: The same objection, your Honor.

The Court: The objection is sustained. If you know, you can answer the question. If you do not know, then just tell him you do not know.

A. From my own personal checkup, no, I do not know.

Mr. Mackay: O. K., Mr. Bowers.

Q. Now I will ask you if the microfilming of the old records was done to improve or prolong the assets of The [22] Times-Mirror Company?

A. No. They will not improve the assets or prolong them.

Q. Was it done for the purpose of increasing the circulation of The Times-Mirror?

(Testimony of Harry W. Bowers.)

Mr. Wyshak: Again, your Honor, a leading question.

The Court: Objection sustained. You have heretofore asked if he did it for any other reason. You have heretofore asked him the purpose.

Q. (By Mr. Mackay): I will ask you, Mr. Bowers, if the microfilming of the old records you have talked about here was done for any other purpose than to protect the Plaintiff and its records?

A. No. It was not.

Q. In your opinion, Mr. Bowers, did the expenditures which were made for the microfilming add to or increase the capital value of the Company?

Mr. Wyshak: If your Honor please, I object to that question on the ground that it calls for a conclusion of the witness.

Mr. Mackay: If your Honor please, the witness is a man who has had a great deal of experience, he is Comptroller of one of our large companies here, he has had public accounting experience and he is capable of answering it and, furthermore, he is an officer of the Company and has a [23] right to express his opinion.

The Court: Objection sustained.

Q. (By Mr. Mackay): I will ask you, Mr. Bowers, if any part of the costs of the microfilming was charged on the books as capital?

Mr. Wyshak: Your Honor, I object to that on the grounds it is immaterial and irrelevant.

Mr. Mackay: Oh, I don't think so.

(Testimony of Harry W. Bowers.)

The Court: Objection overruled.

A. They were not charged as capital on the records of the Company.

Q. (By Mr. Mackay): How were they charged?

A. They were charged as expense.

Q. Was that charge made under your direction as Comptroller?

A. No; I was not Comptroller in that year.

Q. You were not Comptroller, then?

A. I was the Auditor. Mr. Downing was the Comptroller.

Q. Now Mr. Bowers, what was the gross income of The Times-Mirror Company in 1943, approximately? Have you figures there showing that?

A. I have our copy of the return for that year.

Q. Yes.

A. For that year, the gross income where inventory was taken into consideration was \$10,-781,000—— [24]

Q. Just approximately ten million?

A. Ten million.

Q. Approximately what were the expenses exclusive of depreciation?

A. If I may, I prefer to refer to the certified record on that.

Q. All right.

A. I will answer the question fully and go back to it.

The gross income from all sources that year, that is, dividends, advertising and miscellaneous income,

(Testimony of Harry W. Bowers.)

was \$11,935,688.00. I will leave off the cents. And the expenses of all kinds were \$8,990,344.00.

Mr. Wyshak: Might I see the notes to which he refers?

Mr. Mackay: Surely. It is the annual report.

Mr. Wyshak: Do you have 2 copies of that?

A. This is 1944. I can get you a copy, though.

Q. (By Mr. Mackay): I think you gave the total figures for expenses. Now, how much of that was depreciation?

A. The depreciation in 1943 was \$308,278.00.

Q. And what were the corresponding figures for the year 1944?

The Witness: The corresponding figures?

Mr. Mackay: Yes, the gross income and the net income, and so forth?

A. All right; for the calendar year 1944, which is our [25] fiscal year, the gross income from all sources was \$11,539,403.00, and the expenses were \$8,768,475.00, and in those expenses is a depreciation amount of \$292,871.00.

Q. Now Mr. Bowers, you in the beginning of your testimony referred to some missing editions, of the old editions. Do you know how many? Let me ask you this:

How many pages or sheets were microfilmed, do you know?

A. Yes. Now, the pages or sheets that were microfilmed under this cost: There were 820,000 taken from the files.

(Testimony of Harry W. Bowers.)

Q. You mean from the files of The Times-Mirror?

A. From the Times files; and there were 30,579 pages that were sent in from the State of California Library at Sacramento and two other libraries, which were loaned to us and from which we made copies of them on microfilm. In other words, there was a total of 850,579 exposures.

Mr. Mackay: I think you may take the witness.

Cross Examination

Q. (By Mr. Wyshak): Mr. Bowers, for how many years have you been an accountant?

A. About 32 years.

Q. And you are familiar with the nomenclature as to the various items comprising a profit and loss statement? [26]

A. Yes.

Q. Mr. Mackay asked you as to what the gross income was for The Times for the year 1943. What was the figure which you gave him in answer to that question? Approximately.

A. Right around \$11,000,000.00.

Q. Right around \$11,000,000.00?

A. Yes.

Q. If he had asked you what the gross receipts were for that year, what would your answer have been?

A. What kind of receipts?

Q. Gross receipts as defined among accountants?

A. Well, of course, there are two. If I understand your question right—we have cash receipts

(Testimony of Harry W. Bowers.)

and we have receipts from cash and accounts receivable. I didn't know which you meant.

Q. Well, on what basis does The Times-Mirror Company keep its records, on a cash basis or on an accrual basis? A. On an accrual basis.

Q. On an accrual basis? A. Yes.

Q. In accordance with the accounting records kept by The Times-Mirror, what would have been the gross receipts for the year 1943?

A. The gross receipts?

Q. Yes. [27]

A. May I look at this record again?

Q. You may.

A. Now I will answer that question as fully as I know how. The advertising, circulation and newspaper income or revenue——

Q. No. The total gross receipts?

A. Well, that is the revenue which includes the gross receipts, cash and accrual.

Q. What is that figure?

A. \$11,935,688.00.

Q. Is that the same figure as you gave for the gross income?

A. That is the same figure, yes.

Q. It is the same figure?

A. That is right.

Q. In your mind is there a difference between the gross income and the gross receipts? As customarily used by accountants, I mean, the definition of those words?

(Testimony of Harry W. Bowers.)

A. Yes; there is. It all depends upon what kind of a statement they are preparing.

Q. Now, what is the difference between them, then?

A. Now, on a cash receipt, of course when you sell a piece of merchandise, whatever cash you get for that is a cash gross receipt.

Q. What would be the gross income with respect to that item? [28]

A. In that particular case it would be the same figure.

Now, in the net, if there was any so-called discount in connection with that transaction, that still would be deducted from that. I am not trying to be technical but that is the way we handle it down there.

Q. Could you tell us in what month and what year the microfilming was actually started?

A. Approximately. The contract was entered into in July, 1943. The work was started in about September of 1943 and was ended, as I recall it, sometime in the fall of 1944. If the record shows differently it is because I don't remember.

Q. Was the \$40,000, which was deducted on the tax return, paid in 1943?

A. The \$40,000, most of it was paid in 1943.

Q. Who was doing this microfilming?

A. I beg your pardon?

Q. Who was doing this microfilming?

A. Microstat Corporation here in Los Angeles.

(Testimony of Harry W. Bowers.)

Q. Did Microstat bill you for the work that has been done in 1943?

A. I can give you the exact amount on that.

Q. Will you do so, sir?

A. I am sorry. I thought I had it here. I still think I have it. Yes. In 1943 there was billed and paid [29] \$31,265.00.

Q. Do your books contain any item for the year 1943 which sets worth the figure \$40,000.00?

A. Yes.

Q. And what was that entry?

A. That entry was based upon 500,000 exposures at 8 cents each and setting up the expense on the accrual basis which was the original amount that was estimated to be done, and of that amount, as I stated, \$31,265.00 was paid that year.

Q. What I mean is what account was it charged to?

A. To an expense account. I don't know the correct title offhand.

Q. Was it set up as an accrued expense or was it set up as a reserve?

A. Set up as an accrued expense.

Q. How long after this paper was published did you confer with any of the Directors relative to the preservation of the Times' records?

A. As to myself I did not confer with the Directors at all. I was not an officer then.

Q. Were you a Director?

A. No. I was not.

(Testimony of Harry W. Bowers.)

Q. Well, how long after this paper was published did you take it up with anyone? [30]

A. Well, the morning that I came to the office. I testified earlier the morning I came to the office, the discussion started that morning.

Q. With whom?

A. Between Mr. Downing and myself. Mr. Downing was the Comptroller, Treasurer and Secretary of the Company at that time.

Q. Was he a Director?

A. No. He was not. And that precipitated this conversation and from that time on there was conversation back and forth with different individuals. I was not present at any of the discussions with the board of directors.

Q. Do you know if and when the Directors considered this?

A. No; I do not. I haven't a note on that.

Q. Do you know if the Directors passed on this at all?

A. I have my doubts that they did. I don't recall it being in the minutes and if they did reflect it, it is because I don't remember. I think that was a Management decision.

Q. Well, who ultimately made that decision?

A. Mr. Norman Chandler.

Q. Do you know when he came to that decision?

A. I think the decision was finally made in the spring of [31] 1944. The contract was signed in July, 1944.

Mr. Mackay: Wait a minute.

(Testimony of Harry W. Bowers.)

Mr. Wyshak: 1943?

A. 1943.

Mr. Mackay: Do you want to correct your first statement? You said "1944" then.

A. In 1943.

Q. (By Mr. Wyshak): In other words, the ultimate decision was not made until over one year had elapsed from the time the paper was published?

A. The final order of decision, yes.

Q. You say that the negative is kept in the Treasurer's vault. You are the Treasurer, are you not?

A. That is correct.

Q. Would you describe that vault for us and its location?

A. Yes. It is on the 4th floor in the Executive offices. It is a very fine structure of the No. 1 Fire—it passes what is known as I believe the Star Regulations with the Fire Board. It has a time lock. The door is I would judge maybe 12 inches thick; and it has concrete and steel walls—a very substantial vault.

Q. Then, you would consider it bombproof and fireproof?

A. I don't know as I could answer that question. I don't know. If I may elaborate on my statement—

Q. Would you, please? [32]

A. I have seen the results of bombings. I think that I am one of the employes of The Times-Mirror Company that has had occasion to check into the records of the early bombing, that is the bombing in 1910, and I have had occasion to see some of the

(Testimony of Harry W. Bowers.)

results in London and in Germany of bombing there of records and of buildings, and still I don't know whether that safe would go through a bombing. I don't know. I believe it would.

Q. Is it airconditioned?

A. Airconditioned, yes.

Q. Does anyone else besides The Times-Mirror, the Huntington Library and the Los Angeles Library have a positive print of these back issues of The Times?

Mr. Mackay: You mean at the present time?

Mr. Wyshak: Yes.

A. If any other depositary has it?

Q. Does anyone? Are only those 3 prints in existence?

A. No, no. There are other prints in existence.

Q. And who has those other positive prints?

A. Well, I have a list of them. I will read it off to you.

Q. Will you please, sir?

A. Now, I would like to make this statement: This is a letter from The Microfilm Corporation of California. We have nothing to do with the printing made from the negatives, [33] and here is their letter.

Q. May I ask, you mean you yourself do not have anything to do with that?

A. That is right, we do not have anything to do with that.

(Reading from letter:)

The California State Library at Sacramento,

(Testimony of Harry W. Bowers.)

The Stanford University, Stanford, California, The Pomona Public Library, Pomona, California, The San Diego Public Library, at San Diego, California, The Claremont College, at Claremont, California, The University of California, at Berkeley, California, The Midwest Inter-Library Center, Chicago, Illinois, The Library of Congress at Washington, D. C., The State College of Washington, Pullman, Washington,

and the University of Missouri has a microfilm of the Times from 1881 to 1948.

Q. Did these colleges ask the Times for these positive prints?

A. No. The ones that I definitely know about, no. The ones I know about solicited the Microstat Company. They in turn then contacted us as to whether we will give them a permit to use the negatives.

Q. Has the Times ever refused to let anyone have a positive? [34]

A. No, not that I know of.

Q. In other words, the Times would consider it a public service? A. That is correct.

Q. And also in the form of advertising, for these libraries, Colleges and Universities to have copies of the Times?

A. In the form of advertising?

Q. What I mean is to give the Times more notoriety, so to speak, so that if anyone would want

(Testimony of Harry W. Bowers.)

to refer to a past event he would be directed to the Times?

A. Well, I never understood it in that way, no. I take it, regarding these institutions like the State Library at Sacramento, the Library of Congress in Washington, D. C. and these other institutions, in my understanding it is for historical purposes.

Q. It does help the public relations, does it not, and establishes prestige for the Times to have these prints in the various libraries and colleges?

A. As to the prestige of the Times, is that the question?

Q. And also helps public relations?

A. In the same category that we publish a newspaper, yes.

Q. I believe you said that the one positive that the Times has is kept in the Editorial department?

A. Yes.

Q. On the 4th floor? [35]

A. No. On the third floor.

Q. On the third floor? A. Yes.

Q. Under what conditions is it kept there?

A. It is on the outside of a large vault, just along the wall, like any other file.

Q. Is there a custodian of those films there?

A. Yes.

Q. How many viewing machines do you have there? A. One.

Q. How far away is this positive print from the room where the bound volumes are kept?

A. I don't think it is over 10 feet from where

(Testimony of Harry W. Bowers.)

the film is lodged in this file to the entrance of the vault.

Q. To amplify your answer to that question, you meant the vault where the bound volumes are kept?

A. Yes; that is right.

Q. Are those papers prior to the bombing in 1910 which are kept in the bound volumes referred to at all?

A. Occasionally, yes.

Q. What is the condition of the negative which is kept in the Treasurer's vault as of today, if you know it?

A. In good condition.

Q. Would you say that it is just as good as the day it was made? [36]

Mr. Mackay: I will stipulate.

Mr. Wyshak: Will you also stipulate the same as to the condition of the positive?

Mr. Mackay: Yes.

Mr. Wyshak: "Yes?"

Mr. Mackay: Yes.

Q. (By Mr. Wyshak): If I should go to the Times and ask for a copy of a newspaper published in 1913, would I be provided with a copy of a micro-film of the newspaper for that date, or a copy of the paper itself?

A. In 1913?

Q. Yes.

A. May I look at the record on that?

Q. Yes.

A. And see what the condition of it was.

Q. I don't believe that you mentioned the year 1913 in the years that you enumerated.

(Testimony of Harry W. Bowers.)

A. In 1913, the volumes are in good order there; yes, you would get a copy of it.

Q. Pursuing my last question, Mr. Bowers, would the copy you sold to me be a copy of the bound volume edition or of the microfilm?

A. In the year 1913?

Q. Yes.

A. You would be shown a copy of the bound volume. [37]

Q. What I mean is, if I wanted a copy of it, would I be given a copy printed from the microfilm, or would a photograph be taken of the bound volume edition?

A. You mean to look at it, I take it?

Q. No. I mean to take it with me?

A. You couldn't take that with you. You could not take it with you.

Q. The Times would not make a copy of that for me? A. Make a copy for you?

Q. Yes.

A. No. They would not. If you wanted a copy to use elsewhere than in the Building, you would be directed to the Public Library.

Q. No. What I mean is, supposing I would want a copy of a certain edition—— A. Yes.

Q. ——would I be given a copy made from the microfilm or a copy made from the bound volume?

A. I don't quite get your question? When you want a copy, if I answer according to my understanding——

The Court: I don't think you have made your-

(Testimony of Harry W. Bowers.)

self very clear. I think the first question you should ask him is whether it would be possible to purchase a copy. That is the first question.

Q. (By Mr. Wyshak): Would it be possible for me to purchase [38] a photostatic or a photographic copy of an old edition from the Times?

A. A photostatic copy?

Q. Or a photographic copy or reproduced by any process?

A. If you wanted a copy of an edition in photostat form, we would direct you to the Microstat Company and they would get it for you undoubtedly.

Q. Supposing an employee of the Times for one reason or other wanted a reproduction of an old edition, would that reproduction be made from the bound volume or from the microfilm?

A. It would be in the same classification. It would be cheaper to go to the Microfilm people or the Microstat people and get a copy of it.

Q. It would be made from the microfilm, then?

A. That is right.

Q. I believe you stated that the purpose of the microfilming was to avert a bombing result or to safeguard having copies of the Times in the event of a bombing?

A. To preserve those records, yes.

Q. That would mean a bombing by anyone, would it not, not merely by the foreign power that was referred to in this edition (Indicating)?

A. The decision that was made upon this micro-

(Testimony of Harry W. Bowers.)

filming was based upon what I refer to as a war bombing, like [39] what happened that morning.

Q. Was it not feared that there might be another bombing caused by some sort of civilian disturbance?

A. I have never heard that discussed in the light of your question.

Q. Has the Times microfilmed any of their other records?

A. No. We have not.

Q. Do you know what the rag content, if any, is of the newspapers?

A. The rag content?

Q. Yes, of the paper on which the Times is printed?

A. I don't think I am qualified to go into that, sir. No, I do not.

Q. You do not know?

A. That is right.

Q. Regarding any of those early newspapers which were not affected by fire or water resulting from the 1910 bombing, have any of them reached such a condition that they cannot be referred to?

A. Those that were not offered by the 1910 bombing are usable and are referred to.

The Court: We will take a five minute recess.

(Forenoon recess.)

The Court: You may proceed. [40]

Q. (By Mr. Wyshak): At the time you decided to microfilm those old newspapers, wasn't one consideration that sooner or later the paper itself would wear out or decay?

(Testimony of Harry W. Bowers.)

A. No. I never heard that discussed and I will tell you why it wouldn't be discussed. There is the second volume.

Mr. Wyshak: I haven't asked you that.

Mr. Mackay: Let him explain his answer.

The Court: He can explain his answer.

A. I will tell you why. We have 2 volumes here. One of the volumes is not used.

The Court: Don't tell us why. That isn't an explanation of the answer.

A. It just doesn't deteriorate in the unused volume to any great extent.

Q. (By Mr. Wyshak): But in time it will deteriorate, sooner or later?

A. In a long period of time, I would say it would.

Q. It would?

A. In a long period of time.

Q. Directing your attention to my previous question about an employee of the Times desiring a reproduction of an old edition, what I meant was if the employee needed it for his work, would he still be directed to this microfilming company that you referred to, to get a copy? [41]

A. If he needed to refer to an old copy? I don't quite get what you mean there now.

Q. Supposing an employee of the Times were going to go to China or to some foreign country and for some reason or other he needed a reproduction of an old edition of the Times and he was going to the foreign country in the course of his

(Testimony of Harry W. Bowers.)

employment, would he still be directed to the Microstat Company to obtain that copy?

A. For that case, I would say no. We would use the same method we did here—a photostat copy.

Q. Well, under what circumstances would he be directed to the microfilming company to get a copy?

A. As I understood your question, if he just wanted a page copy and not a full edition——

Q. Supposing he wanted a full edition?

A. If he is directed to go to China, as you said, we would give him a photostatic copy.

Q. Well, I asked you under what conditions would he be directed to the microfilming company?

A. Under what conditions would he be directed to the microfilming company?

Q. Yes.

A. In that case I could visualize this. I don't know of any where it has been done. We are not set up to furnish copies to anybody who comes in, employees included. We [42] would give him a copy of a back issue in the way I have stated. If someone came in or if an employee for his own personal reason wanted a copy of an edition, we are not set up to furnish it. We send him down to the Microstat Company, he would get permission to use the film, and that would apply to an employee as well as to an outside individual.

Q. Is this microfilming company in any way connected with the Times? A. No, no.

Q. They do, however, have a negative, a copy of the negative copy which you have?

(Testimony of Harry W. Bowers.)

A. Do they have?

Q. Yes.

A. I doubt it very much. When they make a copy, when they make a print, they come and borrow ours, so I don't know.

Q. Whenever any reproduction is made from the negative, your negative is used?

A. That is correct, so far as I know.

Q. Did you ever confer with Mr. Chandler to aid him in his determination to have these microfilms made?

A. Me?

Q. Yes.

A. No. I did not, no. All my discussion was with my [43] immediate superior.

Mr. Wyshak: Your Honor, I move to strike all the witness' testimony touching on the reason for the microfilming of the records, on the grounds that it is hearsay, incompetent and immaterial.

The Court: Denied.

Mr. Mackay: Are you through on *direct*?

Mr. Wyshak: Yes.

Redirect Examination

Q. (By Mr. Mackay): Mr. Bowers, I think you were asked about how much The Times-Mirror was billed for the microfilming in 1943 and I think you testified it was about \$31,000.00, as I recall. Will you tell the court if during the next 60 days, the early 60 days in 1944, you had other billings from the Microstat Company?

A. Yes.

Q. How much was it then?

(Testimony of Harry W. Bowers.)

A. I will look at the record on that. I stated that we paid \$31,265.00 in 1943. And in the first 60 days in 1944 we paid \$14,895.00.

Q. I think you stated that a number of Universities had procured a positive of the microfilm of the Times back issues? A. Yes. [44]

Q. Will you tell the court whether the Times sought them out to get those positives of its old issues? A. Sought them out?

Q. Yes.

A. No; they did not. From any knowledge I have, they did not.

Q. Well, how would they come about to get that?

A. I don't know what would—

Mr. Mackay: I will withdraw that.

Q. Can you tell me, when these Universities you spoke about obtained their film, was it in 1943 or 1944?

A. I don't know whether I have the dates on that. That was spread out over a period of time. This was not all done at one time. It was done over a period of time of 4 or 5 years.

Q. Well, does The Times-Mirror pay for any of the cost of supplying these Universities with a positive film? A. No. They did not.

Q. That is borne by the Universities themselves?

A. As far as I know. It wasn't by us.

Q. I beg your pardon?

A. It was not by us.

Q. Now, Mr. Bowers, why was there delay be-

(Testimony of Harry W. Bowers.)

tween about February, 1942 and the next year, in having the microfilming done, if you know? [45]

A. Well, that was a new procedure—new to us. There wasn't a great deal of experience to draw upon. It is my understanding that the microfilming procedure——

Mr. Wyshak: Your Honor, I object to the witness' answer, on the ground that it is based on hearsay. He has already testified that he did not confer with Mr. Chandler with whom the ultimate decision rested.

Mr. Mackay: Well, this man who is the Comptroller certainly would know what the condition of the microfilming was at that time.

Mr. Wyshak: He wasn't Comptroller at that time.

Mr. Mackay: I don't care whether he was Comptroller then or not. He was there. And everyone knows that the War was on and they couldn't get help or anything else and we also know that the films were scarce. I don't understand the objection, your Honor.

The Court: I don't understand whether you are objecting to the question or whether you are objecting to the answer.

Mr. Wyshak: I am objecting, your Honor——

The Court: On what grounds?

Mr. Wyshak: On the grounds that it is hearsay and incompetent, and on the further ground that the witness has already testified that he did not

(Testimony of Harry W. Bowers.)

confer with Mr. Chandler with whom the ultimate decision to microfilm rested. [46]

The Court: Objection overruled.

Mr. Mackay: Read the question, please.

The Court: Read the question to the witness.

(Pending question read.)

A. As I started out to say—I will preface my remark with this: I was sitting then with Mr. Downing as an assistant, I was the Auditor, and he was Comptroller, Treasurer and Secretary of the Company, and discussion was borne or this idea started the morning of this raid and there was no experience from my side or from Mr. Downing's side with the microfilming of back issues, as far as we knew, and there was no basis early to such experiences.

Mr. Wyshak: I move to strike this answer as not responsive.

The Court: It may go out on that ground, that it is not responsive. Read the question to him again. Just answer the question, if you can answer it.

(Pending question re-read as follows: "Q. Now Mr. Bowers, why was there delay between about February, 1942 and the next year, in having the microfilming done, if you know?")

A. From my knowledge the delay was due to gathering of information on how it was to be done and the difficulties that we would have to surmount in doing the work. It took [47] considerable amount of time to explore that.

Q. (By Mr. Mackay): Well, what particular

(Testimony of Harry W. Bowers.)

difficulty did you encounter and with respect to the ability of somebody to go ahead and microfilm at that time?

A. Lack of experience, the exchange of experiences with competition.

Mr. Wyshak: Your Honor, I move to strike that answer as not responsive.

The Court: Overruled.

Q. (By Mr. Mackay): Well, had you discussed this with any film company or anybody else in that business, to find out whether or not they could undertake such a job?

A. We eventually got to discussing this with the Microstat Company, that is true.

Q. Had you discussed it with anybody else besides Microstat Company at that time or prior to that time?

A. I recall Mr. Downing discussing this with a representative of Eastman Kodak Company, the local representative.

Q. And had they proposed a plan of micro-filming?

A. They didn't propose a plan. They just told how it was to be done that seemed to be practical from their point of view.

Q. And what did they say with respect to how it should be done? [48]

A. Well, the difficulty there was that they were not set up to handle the job, at that time, of our kind. Their microfilming, as I recall it, was confined to people sending the issues to I believe Roch-

(Testimony of Harry W. Bowers.)

ester and they would microfilm them and send them back.

Mr. Wyshak: Your Honor, I move that answer go out as hearsay.

The Court: It is not responsive. You could object as soon as he starts answering, when we have three words out of his mouth, when you know it is not responsive. That is when you should make your objection in that instance. Objection sustained. Read the question to him.

(Pending question read as follows: "And what did they say with respect to how it should be done?")

The Court: That is very simple. All it asks is what did they say?

Mr. Mackay: That is right. In substance?

A. That to do a job of this size at long range was a difficult job and would have to be studied.

The Court: That is what they said?

A. That is the substance of what they said, yes.

Q. (By Mr. Mackay): Is that all they said?

A. No. Then they explained how they handled the microfilming of current issues and the problem of how they [49] would have to do it out here in Los Angeles for us, and the answer was that they would have to make a special setup.

Q. Just a minute. I will ask you, Mr. Bowers, and I think I asked you this once before, if The Times-Mirror bore any of the cost——

A. I didn't get that?

Q. I think I asked you a while ago whether

(Testimony of Harry W. Bowers.)

The Times-Mirror stood any of the cost of these Universities and Libraries getting the prints?

A. No. We did not.

Q. Except the Huntington and the Public Libraries here.

A. In those two instances.

Q. And I think your answer was "No"?

A. That is correct.

Q. Did the Times-Mirror receive any compensation for permitting the microfilming company to use the negatives?

A. No, sir.

Q. For any of those prints?

A. No. They did not.

Mr. Mackay: I think that is all.

Recross Examination

Q. (By Mr. Wyshak): Has the Huntington Library or the Los Angeles Library [50] received any positive microfilm subsequent to the time they originally got the positives?

A. Subsequent to that?

Q. Yes, subsequent?

A. Yes, they did.

Q. Did the Huntington Library receive positive prints of the current editions?

A. That is correct.

Mr. Wyshak: That is all.

The Court: I understand from your last statement there that the positive prints were first received by them in 1943 and then ever since that time, when the current issues were microfilmed, positive prints were sent to these libraries?

(Testimony of Harry W. Bowers.)

A. That is correct.

Redirect Examination

Q. (By Mr. Mackay): I would like to ask you, Mr. Bowers, about these current microfilmings; how often is that done?

A. Once a month.

Q. Once a month?

A. That is right.

Mr. Mackay: That is all.

I would like to call Mr. Carraro. [51]

ROMEO CARRARO

called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows, to-wit:

The Clerk: Your full name, please?

A. Romero Carraro.

Direct Examination

Q. (By Mr. Mackay): Mr. Carraro, where do you live?

A. I live at 10402 Nevill Avenue, Downey.

Q. What is your occupation?

A. I am Chief Librarian of the Los Angeles Times.

Q. And how long have you been Chief Librarian of the Los Angeles Times?

A. Since September 2nd, 1945.

Q. And as Chief Librarian, tell me just what you are in charge of?

A. I am in charge of what is known in newspaper parlance as the Morgue, now called the ref-

(Testimony of Romeo Carraro.)

erence room, in which you will find an index to the Los Angeles Times and the bound volumes of the Los Angeles Times, plus our added microfilm file.

Q. Do you have charge of the negative of the microfilm that we have been talking about?

A. No. I have charge of the positive. [52]

Q. Of the positive? A. That is right.

Q. And are you in a position to tell to what extent it has been used? A. Yes, I am.

Q. To what extent has the positive print been used, Mr. Carraro?

A. As far as the Times' personal business, two men have used the positive file, the positive microfilm file in the library. One was the late Col. Cleve Jones. The other man is Ed Krauss, of our editorial department, for our little article that we run on our editorial page. They used it for approximately a period of less than 2 years, and at that time, when they were using it, they probably used it from 2 to 3 times a week. And I have used it myself to answer letters or inquiries from the public anywhere from 2 to 6 times a year.

Q. Is that the extent to which that is used?

A. That is the extent to which that is used. We don't use the microfilm——

Mr. Wyshak: I move to strike that out as not responsive to any question.

The Court: You mean this last?

Mr. Wyshak: Yes.

The Court: It is a volunteered statement. [53]

Mr. Wyshak: Yes, it is.

(Testimony of Romeo Carraro.)

The Court: Starting with "We don't use".

Mr. Wyshak: That is right.

The Court: Wait for another question.

Q. (By Mr. Mackay): Who turns on the micro-filming viewing machine if it is to be used by either one of the two gentlemen you have been talking about?

A. Either myself or one of my assistants.

Q. Does The Times-Mirror have any facilities for making reproductions from the positive film?

A. No. We do not.

Q. And therefore, are any reproductions made from the positive film by The Times?

A. No.

Q. Supposing that somebody wants a reproduction from the positive?

A. The only reproduction we can make is from our bound volumes.

Mr. Wyshak: I move to strike that as not responsive.

Mr. Mackay: I think that is responsive.

The Court: Overruled.

A. The only reproduction we can make is from our bound volumes, and we will make a photostatic copy from the bound volume only.

Mr. Mackay: Well, you speak about those two gentlemen, [54] Mr. Krauss, and what was the other gentleman's name?

A. The late Col. Cleve Jones.

Q. Yes. And why would it be necessary to use the positive film?

(Testimony of Romeo Carraro.)

A. Well, they used the positive film for the years that we do not have a bound volume for and we were able to secure the papers from the Bancroft, the State Library or other libraries in which they are microfilmed.

Q. Can you tell the court when they used that?

A. They used that in about 1948 and 1949.

Q. Have they used it since that time?

A. They have not.

Q. Are the bound volumes used by the reporters and editorial staff? A. Yes, they are.

Q. Do you have any complaints from anybody when they use the microfilm?

Mr. Wyshak: Your Honor, I object to that for the reason that that is immaterial and irrelevant.

The Court: Overruled.

A. Well, I complain about it myself, because reading the microfilm is a very tedious job and you cannot do it for a period of longer than ten minutes at a time without resting. Mr. Krauss also complained for that same reason.

Mr. Mackay: You may take the witness. You may cross [55] examine.

Cross Examination

Q. (By Mr. Wyshak): Did I understand you to state that Mr. Krauss used the microfilm in connection with his editorial writing, is that correct?

A. Not his editorial writing. In connection with a column, that was used, of happenings of years gone by.

(Testimony of Romeo Carraro.)

Q. It was published in the current editions?

A. It was published in the current editions, that is right.

Q. Did I further understand you to state that the Times does not have a complete library of the newspapers themselves from the time that they started publishing?

A. Yes. We do not have a complete file of the Los Angeles Times from its inception.

Q. And that the papers that are missing are borrowed from other libraries or Universities in order to have them microfilmed?

A. That is correct.

Q. In other words, you have a complete file in microfilm?

A. We do not have a complete file in microfilm. There is still a great number of missing copies.

Q. Are those papers missing as a result of deterioration or some sort of damage? [56]

A. The files that are missing are probably missing because of the cause of the bombing.

Q. And you were not able to have the missing copies microfilmed by securing them from other sources?

A. We have not been able to secure the missing copies. We are still hunting for them.

Mr. Wyshak: That is all.

Mr. Mackay: That is all. I will call Mr. Krauss.

EDWARD C. KRAUSS

called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows, to-wit:

The Clerk: Your name, please?

A. Edward C. Krauss.

Direct Examination

Q. (By Mr. Mackay): Mr. Krauss, where do you live or reside?

A. I reside at 4022 Cromwell Avenue.

Q. What is your occupation?

A. I am an editorial writer.

Q. An editorial writer? A. Yes.

Q. For whom?

A. For the Los Angeles Times.

Q. How long have you been an editorial writer for the [57] Los Angeles Times?

A. Since about the first of 1928.

Q. And what is your particular aspect of editorial writing?

A. Well, I write any editorials that are assigned to me to write. I do not have any particular field.

The Court: Keep your voice up, Mr. Krauss.

Mr. Wyshak: I can't hear the witness.

Mr. Mackay: Counsel cannot hear you. Would you please speak a little louder?

The Witness: Surely. I will try to.

Q. (By Mr. Mackay): Mr. Krauss, have you had occasion to use the positive microfilm of the old records of the Times-Mirror?

(Testimony of Edward C. Krauss.)

A. I did for a short time, yes, for something less than 2 years.

Q. For what period of time?

A. It was during the years 1949 and 1950 that I used it.

Q. And what was the occasion, then?

A. The occasion was that it was for the purpose of making up what we call "Yesteryear" in the Times, or I think that is the title of it.

Q. Is this it, to refresh your recollection (Showing document to the witness)?

A. "In Other Times". It has been given different titles at various times. [58]

Mr. Mackay: I should like to offer this in evidence, if your Honor please.

Mr. Wyshak: Your Honor, I believe that it is immaterial and irrelevant, and I object on that ground.

Mr. Mackay: Well, it is not too important.

The Court: You do not object on the grounds of lack of foundation, do you?

Mr. Wyshak: No.

The Court: The objection is overruled.

The Clerk: Exhibit No. 4 in evidence.

The Court: It is a question of the weight.

(Said document, so offered and received in evidence, was marked as Plaintiff's Exhibit No. 4 in evidence.)

Q. (By Mr. Mackay): Now will you please explain the occasion for which you used the film?

A. I used the film when the bound volumes were

(Testimony of Edward C. Krauss.)

not available, for the purpose of obtaining the notes for making up this photo that we use, of reprints from the back issues.

Q. Why did you not use it after 1950?

A. I used the film for 1950 because the bound volumes were not available for the year we were doing. We were doing at that time 60 years——

Q. Oh, 60 years prior, you mean?

A. 60 years prior, and that would be 1890, and the bound volumes of 1890 were not available. [59]

Q. Have you had occasion to use the microfilm since 1950? A. No, sir.

Q. Have you had occasion to use the bound volumes? A. Once in a while, yes.

Q. On what occasion did you use them?

A. I am still preparing this on an every other month basis. We divide the work.

Q. Do you find difficulty in using the microfilm?

A. Yes, a great deal.

Q. Why did they drop from 60 to 50 years ago in that little column you write?

A. They dropped because we were informed that the files were very incomplete for several years after 1890, so we shifted from 60 years ago to 50 years ago in order to skip those 10 years where part of the files would be incomplete.

Q. Mr. Krauss, is the microfilm, the positive film always clear? A. No. It is not.

Q. In what respect is it not?

A. Well, when they photographed it they did not break down the binding so that the gutter of

(Testimony of Edward C. Krauss.)

the edge of the page, the inside edge of the page is curved and that does not photograph distinctly and you can't read it, very often.

Mr. Mackay: Thank you. That is all. [60]

Cross Examination

Q. (By Mr. Wyshak): Mr. Krauss, have you ever used any other machine to look at microfilm?

A. No.

Q. At another plant, other than the Times has?

A. No. I have never seen any other one except the one of the Times.

Mr. Wyshak: No further questions.

Mr. Mackay: I think that is all, Mr. Krauss.

If your Honor please, that concludes the Plaintiff's case.

I move for judgment, on the record.

The Clerk: Do you rest?

Mr. Mackay: We rest.

(Whereupon the Plaintiff rested its case in chief.)

(Thereupon the Defendant, to maintain the issues on its behalf, offered and introduced the following evidence, to-wit:)

Mr. Wyshak: Mr. Macartney.

FRED L. MACARTNEY

called as a witness herein on behalf of the Defendant, being first duly sworn, testified as follows, to-wit:

The Clerk: Your full name, please?

A. Fred L. Macartney. [61]

Direct Examination

Q. (By Mr. Wyshak): Where do you live, Mr. Macartney?

A. I am residing at 512 West Grand, San Gabriel.

Q. And where are you employed?

A. In the Los Angeles Office of the Bureau of Internal Revenue.

Q. As a revenue agent?

A. As a revenue agent.

Q. And are you the agent who worked on the instant case? A. I am one of the agents.

Q. I believe you heard Mr. Bowers testify regarding the accounting entry relative to the \$40,000.00 that was set up on the books as an approved expense? A. Yes.

Q. You did? Would you please say "Yes" so we can hear you. A. I heard his reply.

Q. Did you examine the records, the accounting records of the Los Angeles Times for the year 1943 in the course of your audit?

A. No, I didn't make the audit, for the year 1943. I handled the subsequent case on that year.

Q. For the year 1943?

A. Yes. Can I explain how it was done?

(Testimony of Fred L. Macartney.)

Mr. Mackay: I object to such explanation, if your Honor [62] please.

The Court: Wait for another question. Go ahead.

Q. (By Mr. Wyshak): Did you examine the records for the year 1943 at any time?

A. I did not.

Q. You did not. Did you examine any of the closing or adjusting entries for that year?

A. I did not.

Q. Whom did you speak to at the Times regarding the use to which this microfilm is put?

Mr. Mackay: Well, I object to that, if your Honor please. In the first place, whom did he speak to is a leading question. He said he did not examine it for these years. It is incompetent.

Q. (By Mr. Wyshak): Did you speak to anyone?

The Court: Objection overruled. It is a preliminary question. If you are having difficulty, do you want to talk to your witness?

Mr. Wyshak: Just a moment.

The Court: Go ahead, then. It is a preliminary question, I assume.

A. Mr. "Carroll" I believe.

Q. (By Mr. Mackay: Mr. Carraro?

A. Carraro, this gentleman (Indicating), in connection with the microfilm in the vault. [63]

Q. (By Mr. Wyshak): And when did you speak to Mr. Carraro?

A. About the 1st of August, 1950.

(Testimony of Fred L. Macartney.)

Q. Was there any conversation between you relative to the use to which the microfilm was put?

A. Yes. I questioned him as to the use and I recorded his explanation to me.

Q. What use did he tell you it was put to?

Mr. Mackay: I object to that, if your Honor please. If this is offered for impeachment purposes, there is no foundation.

The Court: Is this for the purpose of impeachment, counsel?

Mr. Wyshak: Not for impeachment, your Honor, but to amplify what Mr. Carraro told him.

Mr. Mackay: I think it is entirely incompetent. It was in 1950 and it has nothing to do with it.

The Court: Counsel, Mr. Carraro has testified, but if it is for the purpose of impeachment, of course you may inquire, but lay a foundation of time, place and persons present.

Q. (By Mr. Wyshak): Well, at the time you spoke to Mr. Carraro, who was present?

A. Mr. Bowers and Mr. Mackay, and Mr. Bohler of our office.

Q. Where did this conversation take place? [64]

A. In the Morgue, what is known as the Morgue.

Q. In the Morgue?

A. In the vault where the newspapers are kept and just outside of the vault, where the microfilm was.

Q. When was this conversation?

A. July and August of 1950.

Q. Could you tell us in substance what Mr. Car-

(Testimony of Fred L. Macartney.)

raro said relative to the use to which the microfilm was put?

Mr. Mackay: I object to that, if your Honor please. I don't understand the purpose of this. Is it for impeachment?

Mr. Wyshak: It is.

Mr. Mackay: Then, if your Honor please, there is no foundation laid at all for it. I object to it. The witness is here and he has had the chance to lay a foundation if he wanted to do so. He didn't do so. He told the court a moment ago that it wasn't for impeachment and that now it is. I object.

The Court: Objection sustained.

Q. (By Mr. Wyshak): At that time was Mr. Carraro the Chief Librarian as he is now?

A. I believe he was introduced to me as such. He was in charge of that department.

Mr. Wyshak: Your Honor, I should like to introduce the content of Mr. Carraro's statement to Mr. Macartney as a [65] vicarious admission.

Q. Did Mr. Carraro make any statement to you regarding the use to which this microfilm was put?

Mr. Mackay: I object to that for the same reasons I have heretofore objected, if your Honor please.

The Court: The objection is overruled.

A. Yes. I questioned as to how the film was used and how the bound volumes were used, both of which I was shown.

Q. (By Mr. Wyshak): What did he tell you with respect to the use of the microfilm?

(Testimony of Fred L. Macartney.)

Mr. Mackay: I object to that for the same reason, if your Honor please. The witness has been here before the court and no foundation has been laid.

The Court: The objection is sustained. There is no foundation laid. You have had an opportunity to lay a foundation and no foundation has been laid for the purposes of impeachment. I don't know whether you are referring to the same conversation as a foundation. There isn't any way for me to tell whether you are referring to the same conversation, the same statements or not now.

Q. (By Mr. Wyshak): Well, at the time you conversed with the gentlemen whom you stated were present on that date in July, of what year was it——

A. 1950.

Q. ——did Mr. Carraro make a statement to you regarding [66] the use to which the microfilm was put?

A. Yes.

Q. And what was that statement?

Mr. Mackay: I object for the same reason as heretofore. He hasn't laid a foundation for impeachment purposes and it is entirely incompetent, irrelevant and immaterial.

Mr. Wyshak: Your Honor, I am also offering it as a vicarious admission.

The Court: Counsel, if it is for the purposes of an admission, there isn't any showing that Mr. Carraro is an officer of the Times corporation. As an employee of the Times corporation, there is no showing that he would be bound by the statements

(Testimony of Fred L. Macartney.)

or that the plaintiff here would be bound by his statements.

Mr. Wyshak: If your Honor please, I believe that the Treasurer of the Corporation was present at that time. Mr. Bowers was present and any statements made by Mr. Carraro which were incorrect I am sure would have been corrected by Mr. Bowers at that time, and I submit that the plaintiff is bound, therefore, by the witness' admissions in the presence of the officer.

The Court: Counsel, there isn't any showing that he was present at all.

Mr. Wyshak: If your Honor please, I believe that the witness has testified that Mr. Mackay, Mr. Carraro, Mr. [67] Bowers and someone else were present at the time this conversation took place.

The Court: Well, read his testimony with respect to that.

(Record read by the reporter.)

The Court: Now, with respect to admission, how would the testimony of Mr. Carraro be binding on the Corporation? On what theory would you figure that his testimony would be binding on it as an admission of the Corporation?

Mr. Wyshak: I felt quite certain I asked him the question who was present. The Treasurer of the Corporation was present.

The Court: What difference does it make if the Treasurer of the Corporation was present, if he didn't participate in the conversation? In other words, there wasn't an admission.

(Testimony of Fred L. Macartney.)

Mr. Wyshak: But the Corporation has to act through agents and I think it would be an implied admission on his part if an agent of the Corporation is making statements regarding the action of the Corporation, and I think he would be under a duty to correct any misstatements.

The Court: Well, we will recess now until 2:00 p.m. When you come back, if you are offering this for the purpose of impeachment, you will be permitted to lay a foundation at that time. [68]

Mr. Wyshak: And also for the purpose of the other matter stated.

The Court: What is that?

Mr. Wyshak: And also as an admission.

The Court: Well, we will rule on it at the time you come back.

(Whereupon a recess was taken until 2:00 p.m. of the same day, Thursday, June 17, 1954.)

Los Angeles, Thursday, June 17, 1954, 2:00 p.m.

Trial resumed pursuant to noon recess.

Present: Same as before.

Mr. Wyshak: May we proceed, your Honor?

The Court: All right, you may proceed.

Mr. Wyshak: Your Honor, to clarify this matter of the bound volumes, we have stipulated that with respect to all years prior to October, 1910, when the bombing took place, there is only the one bound set and for years subsequent thereto there are two bound sets.

Mr. Mackay: That is right, your Honor.

Mr. Wyshak: And I would like to put Mr. McCartney back on the stand.

The Court: Prior to 1910 there is one bound volume from 1883, is that right?

Mr. Mackay: From 1881, your Honor.

The Court: From 1881 to 1910, there is one bound volume?

Mr. Mackay: That is right.

Mr. Wyshak: That is right.

The Court: I understand the testimony to be, however, that in some cases there are some missing.

Mr. Mackay: That is quite true, your Honor. There may be a whole year missing and then even in the bound volume [70] there may be certain editions, certain issues missing.

The Court: All right.

Mr. Wyshak: And I believe there was some testimony that with respect to some of those where the newspapers are missing they do have microfilm.

Mr. Mackay: As to some of them only, that is right.

The Court: According to some of the testimony that has gone in now, of course there are some of those papers that are missing and they had microfilms of all of those that the Times has. They have supplemented those by some that they have received from libraries and private parties, that they have borrowed and microfilmed.

Mr. Mackay: Yes, sir.

Mr. Wyshak: That is correct, your Honor.

The Court: So that they have some microfilms of some that they do not have the originals of.

Mr. Wyshak: That is correct, your Honor.

The Court: And in addition to that, there are some of which they neither have the originals of nor do they have a microfilm of them, because they have not been able to locate them.

Mr. Mackay: That is correct.

Mr. Wyshak: That is correct, your Honor.

Mr. Macartney. [71]

FRED L. MACARTNEY

resumed the witness stand on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows, to-wit:

Direct Examination—(Continued)

Q. (By Mr. Wyshak): Mr. Macartney, directing your attention to that day to which we referred, in July, 1950, when you went to the Times Building, I believe you stated that you went to Mr. Bowers' office?

A. I did.

Q. And to whom did you speak, then?

A. Mr. Mackay and Mr. Bowers. I was with Internal Revenue Agent Bohler. We were representing the Government. There were Mr. Mackay and one assistant from his office, and Mr. Bowers and two of his assistants not including the Librarian.

Q. And what did Mr. Bowers say to you with respect to the microfilm?

Mr. Mackay: If your Honor please, I object to

(Testimony of Fred L. Macartney.)

it on the ground it is improper. There is no foundation for impeachment laid.

I want to say this for the record: If counsel thinks there is any misunderstanding in respect to any fact, I would have no objection and I would be very happy [72] to recall the Chief Librarian here for him to lay any foundation that he wants to. He had the opportunity once. I do not object to him taking it again. I am just as anxious to get this cleared up. I think there is no real difference between us, but I would like to see it done in the right way.

The Court: Well, I have tried to be as helpful as possible. I have not been able to determine what counsel is attempting to prove. I have inquired as to whether or not it was for the purpose of impeachment, and after the objection I even went so far as to state that I would permit you to lay a foundation, if it is for impeachment, to put the witness back on the stand, because no foundation has been laid. It was Mr. Carraro whose statements you were referring to in your interrogation of this witness before and now it is Mr. Bowers. Now of course if it is for impeachment, if there were contradictory statements, then you may lay a foundation, by calling the witness, either Mr. Carraro or Mr. Bowers, or both, as the case may be, and lay your foundation. If it isn't, then I would like to know on what ground you are offering it. The evidence, of course, ordinarily is hearsay, so we start with that. Now, you tell me under what

(Testimony of Fred L. Macartney.)

exception to the hearsay rule you are attempting to put this evidence in. [73]

Mr. Wyshak: Your Honor, I should like to introduce this evidence for two purposes: One is an implied or adopted admission and secondly to impeach Mr. Carraro.

The Court: Well, as I stated, you can't impeach a witness without first confronting him with the statement and laying a foundation of time, place and persons present.

Now, ordinarily in the trial of a case, if you have not laid a foundation, a witness may not be impeached under any circumstances, and that ends it. In this case we have gone a little further. Assuming that you neglected to lay the foundation, so that all of the evidence may be before the court, the witnesses being present in the courtroom, I have stated that you may lay the foundation. Now, if you are interested in what Mr. Carraro said, in other words, if you believe that Mr. Carraro made a statement that is contradictory of his present testimony here today, then you may put him on the stand and ask him directly whether or not he made such-and-such a statement. If he admits he made the statement, the matter is at an end, that is all there is to it. If there is an impeaching admission, he is then impeached. If he does not admit it, then you may offer proof that he made the statement. Now, that is the only way that you can impeach a witness.

Now, if it is not for a matter of impeachment and if it is a matter of admission, then, in order

(Testimony of Fred L. Macartney.)

to bind the [74] Corporation, you will have to make some showing as to the particular matter on which you are seeking an admission and show that the individual was an agent of the Corporation and authorized to act and speak as he did. And if I may take the extreme, as an illustration, obviously the receptionist in the lobby of the Times Building would not have authority to make statements as to questions relative to the microfilming.

Mr. Wyshak: Your Honor, my feeling was this: That in view of the fact that it was being offered for an additional purpose, it wouldn't be necessary to establish a foundation with Mr. Carraro, in view of the fact that I contend it was also an admission.

The Court: You do not seem to understand the purpose of impeachment. May I repeat just once more, that a witness may never be impeached without first being confronted with the statement and given an opportunity to explain. I don't even know what you have in mind, but as an illustration, Mr. Carraro testified that the microfilm was used only by Mr. Krauss and Cleve Jones, and it may be that he told this witness that the microfilm was used by Cleve Jones, Mr. Krauss and Kyle Palmer, but you can't impeach him without first putting him on the stand and asking him whether or not at such and such a time, with such and such people present, he said that Kyle Palmer used the microfilm. Now, [75] of course the purpose of that is that he may then say, "I did say that", and he would be entitled to explain the discrepancy. He may say, "I

(Testimony of Fred L. Macartney.)

did say that and my reason for not testifying to that today is because I just didn't think of it", or whatever his excuse may be. That is for the court, that goes to the question of the weight of impeachment, but you can't impeach him without first asking him the question.

Mr. Wyshak: Well, I should like to recall Mr. Carraro, your Honor.

The Court: All right. You may step down.

ROMEO CARRARO

having previously been duly sworn and testified on behalf of plaintiff, resumed the witness stand and testified further as follows:

Examination

Q. (By Mr. Wyshak): Mr. Carraro, directing your attention to July, 1950, do you recall an occasion when Mr. Bowers brought Mr. Macartney and another agent down to the Morgue, when you were there? A. I do.

Q. Did Mr. Bowers request you on that date to show Mr. Macartney around and answer any questions he might have?

A. He didn't request me to show Mr. Macartney anything. [76]

Q. What did he request you to do?

A. He asked me to show the two gentlemen that were with him—and Mr. Macartney was in the background—to show them the morgue and the vault where our bound volumes were.

(Testimony of Romeo Carraro.)

Q. Who were those two gentlemen?

A. I do not know. I was introduced to them and I don't think I have ever met them since, and I took them in the vault, showed them our bound volume, showed them where our microfilm was stored and the machine, where the machine is stored.

Then Mr. Macartney and I was in the background and he was asking me questions about the operations and I recall the conversation with Mr. Macartney, and that is all.

Q. Did Mr. Macartney go with these two gentlemen into the vault with you?

A. Yes, he came in. We all went into the vault.

Q. Were these two gentlemen Revenue Agents?

A. Well, I assumed they were.

Q. You do not know if they were?

A. I assumed they were, from Mr. Bowers' instructions and that he was bringing them down.

Q. Was anyone with Mr. Bowers when they came down?

Mr. Mackay: Off the record. [77] Did you, Mr. Macartney, have somebody else from your office there at that time?

Mr. Fred L. Macartney: Yes, Mr. Bohler.

Mr. Mackay: Let the record show that Mr. Bohler was present. And wasn't Mr. Bennion and I there with Mr. Bowers?

Mr. Macartney: Yes, sir.

My Wyshak: No one else was there?

Mr. Mackay: No one else, Mr. Macartney?

(Testimony of Romeo Carraro.)

Mr. Macartney: I don't believe so.

Mr. Mackay: Let it be stipulated that those people were present.

The Witness: And——

The Court: Just a minute. There is no question.

Q. (By Mr. Wyshak): Do you recall what Mr. Bowers said to you when he introduced you?

The Court: Just a minute. If this is for the purpose of laying a foundation for impeachment, just ask him Did he say so-and-so, word for word, make it verbatim if you can, because that is the question you will ask him for the impeaching question. You don't have to ask him what he said. Just say "On that occasion" did he say such and such.

Q. (By Mr. Wyshak): On that occasion, in your conversation with Mr. Macartney, did you say that the microfilm was used for the period prior to October, 1910? [78]

A. No, I don't think so, because we have a file for four months of 1894——

Mr. Wyshak: Just answer the question.

Mr. Mackay: Let him explain.

A. I am going to answer your question. ——and all of 1895 to 1910, which is in good order, which we used, and we still use it today in preparation of this column and we do not use microfilm for that purpose; and as I stated and told Mr. Macartney, where microfilm is to be used, where the public wants it, we send them to the Public Library.

Q. (By Mr. Wyshak): When Mr. Bowers in-

(Testimony of Romeo Carraro.)

troduced you to Mr. Macartney, what was the substance of what he said to you.

Mr. Mackay: I object to that.

The Court: The objection is sustained.

Mr. Wyshak: Your Honor, I would like to introduce that to show authority delegated by Mr. Bowers as an officer of the Corporation, to Mr. Carraro to speak on behalf of the Corporation.

The Court: Well, I don't know whether Mr. Bowers had authority to delegate to him on behalf of the Corporation. Is that the statement, counsel? Is that the statement that you are seeking to introduce as an admission against interests? [79]

Mr. Wyshak: The fact that he said that they used the microfilm of editions prior to 1910 is the statement. Now, I would like to show that Mr. Carraco was authorized by Mr. Bowers to speak on behalf of the Corporation.

The Court: Counsel, don't you see that he has testified that he did not say that?

Mr. Mackay: That is right.

The Court: He has testified that he did not say that.

Mr. Wyshak: That is correct, your Honor.

The Court: Now, of course you have laid your foundation for impeachment. You now may put on testimony to show that he did say that, and the question then is for the Court to determine whether or not it is contradictory and the effect of the impeachment.

Mr. Wyshak: Well, your Honor, I may be mis-

(Testimony of Romeo Carraro.)

taken, but in addition to impeachment I should like to introduce the statement as heard by Mr. Macartney for the purpose——

The Court: Counsel, you can't introduce the statement from this witness because this witness has testified that he did not say it. Now he has testified that he didn't say it.

Mr. Mackay: Yes, sir.

Mr. Wyshak: Well, that is all, Mr. Carraro.

Mr. Mackay: You may step down. [80]

FRED L. MACARTNEY

resumed the witness stand on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows, to-wit:

Direct Examination—(Continued)

Q. (By Mr. Wyshak): Directing your attention, Mr. McCartney, to this day when you visited the Times Building, I believe you stated that you conferred with Mr. Bowers, Mr. Mackay, his associate, and Mr. Carraro? A. Yes, sir.

Q. When Mr. Carraro was showing you around the vault, did you have any conversation with him with respect to the use to which this microfilm was put? A. Yes; we did.

Q. And what did he state in answer to you?

Mr. Mackay: Just a minute.

The Court: This is a case even on direct examination, as I stated before, where you can ask a leading question. If it is for the purpose of im-

(Testimony of Fred L. Macartney.)

peachment, now you can ask him the same question you asked the witness in laying the foundation. The custom is to write it down and have it in front of you so you can give the same question exactly. That is the proper way to impeach.

Q. (By Mr. Wyshak): Did Mr. Carraro say to you that they used [81] the microfilm for all periods prior to 1910?

The Court: Yes or no.

A. Yes.

Mr. Wyshak: That is all.

Cross Examination

Q. (By Mr. Mackay): Mr. Macartney, you have been in the Revenue Service for quite a while, haven't you? A. Yes, sir.

Q. On that occasion when you came to the Times-Mirror in 1950, you were invited there by myself and Mr. Bowers, weren't you?

A. Yes, sir.

Q. And we took you down to the Morgue, did we not? A. Yes, sir.

Q. And didn't Mr. Carraro say at that time that the microfilm is used very seldom and that it was only used when they didn't have some bound volumes for certain particular years?

A. No; I think not.

Q. He did not say that?

A. There was a statement made prior to that which I was investigating. This is my answer to that statement.

(Testimony of Fred L. Macartney.)

Q. What do you have before you now?

A. You filed the claim and you made statements in the [82] claim.

Q. What do you have before you now?

A. My report.

Q. Your report? A. My script report.

Q. May I see it? A. Yes.

Q. When was this script report made?

A. August of 1950.

Q. When you were down at the Times-Mirror Building, when did this conversation take place?

A. When we were down in the Morgue, at the Times-Mirror.

Q. I know, but when, approximately?

A. About right around the 1st of August or last of July, 1950.

Q. You made no notes at that time of the conversation, did you? A. Yes, I did.

Q. You mean when you were in the vault?

A. No; not——

Q. You didn't make any notes of the conversation at that time, did you?

A. Not at that minute. That day, probably. This is made from my notes.

Q. I know, but you didn't make any notes at the time? [83] A. Not in the vault.

Q. You made the notes several days after?

A. I think I made them immediately that day.

Q. You mean after you returned to your office?

A. Yes.

Q. Were you shown the microfilm?

(Testimony of Fred L. Macartney.)

A. Yes, sir.

Q. Did you look through the projector?

A. Yes.

Q. Isn't it a fact that Mr. Carraro explained the great difficulty that people would have in using the projector and the microfilm? A. No, sir.

Q. He didn't explain it?

A. I don't remember that point. It was obvious that it was easier to look at a newspaper by size than by the size of the opening in the projector.

Q. That was a very obvious thing? That was very obvious? A. The size was obvious.

Q. Didn't he explain to you that there were some copies missing? A. Throughout.

Q. Yes. A. Yes, sir. [84]

Q. And that they didn't have them in the bound volume? A. Yes, sir.

Q. And didn't he explain that they had procured some copies from Universities and libraries which were in the microfilm? A. Yes, sir.

Q. And didn't he tell you at that time that the microfilm was used in those situations where they wanted copies of a paper which were not in a bound volume? A. Very likely.

Q. Well, he did tell you that, didn't he? There isn't any doubt about that, is there?

A. Well, that would be included in the other statement he made. Those periods were prior to 1910. The other statement that I said was made, that the film was used for periods prior to 1910,

(Testimony of Fred L. Macartney.)

would include those that were missing in paper volumes.

Q. Didn't he state that they were used when they were missing prior to 1910?

A. When a paper from the volume was missing prior to 1910, any part they had film of.

Q. And he showed you the bound volumes he had prior to 1910, didn't he? A. Yes.

Q. And you knew that they were being used at that time, [85] didn't you, to the extent that they could be used?

A. They had been used for filming. I saw the condition of them. I saw why he wouldn't—

Q. I know, but the copies of the bound volumes prior to 1910 that they had, you knew they were in use at that particular time, didn't you?

A. No. I was led to believe they were not.

Q. By whom?

A. By Mr. Carraro; and that the film, the micro-film was used.

Q. Have you anything in your statement there where they said that the bound volumes prior to that time were not used? A. Yes.

Q. Let me see it.

The Witness: Here is—

Mr. Mackay: Just a minute.

Q. Was there any distinction that Mr. Carraro made there between the use by the public and by the employees of the Times-Mirror?

A. Yes.

Q. And didn't he tell you that bound volumes

(Testimony of Fred L. Macartney.)

even prior to 1910 were used by the employees of the Company and that the public would use the microfilm for the editions prior to 1910 where there were none in the bound volumes? [86]

A. He told me that prior to 1910 they used the film.

Q. For the public?

A. That they had two volumes subsequent to 1910.

Q. For the public?

A. Well, he didn't break them down as to which was using them.

Q. Oh, he didn't break them down as to which. Did you measure the vault?

A. I didn't understand you?

Q. Did you measure the vault where these papers, documents were contained?

A. Only roughly.

Q. By steps? A. No.

Q. How did you measure it?

A. Just like I would this room.

Q. What do you guess the size of the vault was?

A. Half the size of this room.

Q. Do you remember how many feet?

A. No. I would say 60 by 35.

Q. Well, didn't you put in your report how much its size was?

A. Very likely. 30 by 60 (Indicating paper.)

Q. 30 by 60.

Mr. Macartney, is it not a fact that Mr. Carraro showed [87] you bound volumes prior to 1910 that

(Testimony of Fred L. Macartney.)

were bound in leather and were in excellent shape and condition?

A. I don't think they were in excellent shape and condition.

Q. Well, didn't he show them to you?

A. I had the impression—I saw all the volumes in the vault, but I didn't inspect each one of them, because there were quite a few. I inspected a number that were damaged and burned and charred on the end, and I presumed all of them had been in the fire and all of them had suffered by heat.

Q. Then, because a few of them were damaged by the fire in 1910, you assumed all of them prior to that time were damaged and weren't available, isn't that true?

A. That they were all damaged.

Q. I beg your pardon?

A. That they were all damaged.

Q. That is what you assumed, isn't it?

A. Yes.

Mr. Mackay: If your Honor please, I should like to have this court, if he could, go over there and see the bound volumes. I will withdraw that. I am perfectly willing to do that, because we know we have the bound volumes there and in good condition prior to 1910.

I think that is all from this witness. I may say for [88] the record, Mr. Macartney is a very fine agent, but I think he is just mistaken and he makes assumptions which aren't justified.

(Testimony of Fred L. Macartney.)

Redirect Examination

Q. (By Mr. Wyshak): Mr. Macartney, in answer to Mr. Mackay's last question did you state that you assumed or presumed that all of the volumes prior to 1910 were damaged?

A. Yes, sir.

Q. Did you look them over?

A. I looked over quite a few of them.

Q. Well, what percentage of them would you say you looked over?

A. Well, on some the volume shows from quite a distance, you can see that it has been damaged from water and fire and heat, and I looked at some of them closely. Some I didn't look at because they were piled up high on the racks, but they were all in a place where the fire and heat and water and bombing had taken place, and the idea of the film was because those were deteriorating so fast after the destruction.

Q. Well, did you see any of those volumes prior to 1910 that were in good condition?

A. Well, they may have been in good condition. They appeared to—— [89]

Q. Did you see any?

A. I saw all of the volumes. I don't know what the condition of all the volumes was.

Q. Did you see any volumes prior to 1910 that were in good condition?

A. Well, they appeared to be in good condition, but I couldn't—only by appearance.

Mr. Wyshak: That is all.

(Testimony of Fred L. Macartney.)

Recross Examination

Q. (By Mr. Mackay): Well, if they appeared to be in good condition, why would you assume they were not available for use?

A. I was there inspecting them for that very purpose, to see what they were for.

Q. Do you know how many volumes were there prior to 1910 bound in good red leather and in good condition?

A. No. I could guess.

Mr. Mackay: No; I don't want your guess. That is all.

The Witness: What did you say?

Mr. Mackay: That is all. I would like to recall Mr. Carraco. I beg your pardon. Are you finished?

The Court: Just a moment. Have you rested?

Mr. Wyshak: Yes, your Honor, the defendant rests.

The Court: All right.

(The defendant rested its case.) [90]

(Thereupon the plaintiff, to further maintain the issues on its behalf, offered and introduced the following evidence, in rebuttal, to-wit:)

ROMEO CARRARO

recalled as a witness herein on behalf of the plaintiff, in rebuttal, having been previously duly sworn, testified further as follows, to-wit:

Direct Examination

Q. (By Mr. Mackay): Mr. Carraro, in what condition in 1950, prior to Mr. Macartney visiting

(Testimony of Romeo Carraro.)

the Times plant, were the bound volumes prior to 1910, would you say?

A. I would say that 90 per cent of the bound volumes prior to the period that Mr. Macartney states are in good condition.

Q. How are they bound?

A. They are bound in red leather.

Q. Are they readable?

A. They are very readable.

Q. And are they being used today?

A. They are being used today.

Q. And have they been used ever since 1943—

A. They sure have been.

Q. —since this filming was done?

A. They sure have been. [91]

Q. Now, did you ever tell Mr. Macartney that the positive film was used for all examinations prior to 1910?

A. No, I didn't tell him that statement.

Mr. Mackay: I think that is all, your Honor.

Mr. Wyshak: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Mackay: Your Honor, at this time we rest.

(The plaintiff rested its case.)

The Court: Do both sides rest?

Mr. Wyshak: Yes, your Honor.

(The Defendant rested its case.)

Mr. Mackay: I would like to make a motion for judgment on the record, if your Honor please. Would you care for an argument at this time?

The Court: You may argue it.

Both sides have rested. If you care to argue it, you may do so.

Mr. Mackay: I would like to, if your Honor please. [92]

Opening Argument by Mr. Mackay on Behalf of
Plaintiff Times-Mirror Company:

Mr. Mackay: If your Honor please:

The law seems to be pretty well settled, I may state, that the question of whether an expenditure is an ordinary and necessary business expense or is a capital expense which should be capitalized depends upon the nature of the business and the purposes for which that money was expended.

The Tax Court and a number of courts have consistently held that where an expenditure is made for the protection of property, not to increase, not to enlarge and not to prolong the life of the plant, that is an ordinary and necessary business expense because it does not add to the capital value of the assets.

Now, the courts have held with respect to newspaper companies that if they buy a large circulation structure, that they would have to capitalize that expenditure, because that is about to increase their circulation, but if they go out and get circulation to keep up their normal operations to the same level, that that is an ordinary and necessary expense.

We have cited the Bemberg case in our brief where a company's plant had some disastrous cave-

in which threatened to annihilate it and they expended over [93] seven hundred thousand dollars in one year and approximately two hundred thousand dollars in another year, for the purpose of protecting it, and the appellate court of the United States said that that was an ordinary and necessary expense.

We have also cited the Illinois Merchants Trust Co. case, involving the situation of another plant, where low water exposed parts of its piles and dry rot set in, and they sawed off the piles and put cement sections under the plant, at great expense, and the court held that that was an ordinary and necessary expense.

Now, the evidence in this case, if your Honor please, is just this:

On February 25, 1942, we had here what we thought was a very serious thing; there was a bombing, so the papers say. I appreciate that the Army and Navy didn't, and reports were conflicting, but as far as the general public knew, it was real and they were scared. So under the law of self-preservation, this taxpayer decided to protect itself, and decided that it should have its back papers microfilmed, and it did. It kept the negative in its own files in a different place than where it kept its own print and positive. It gave a positive print to the Public Library so that that would be available in the event that the Times-Mirror should be bombed. [94] It gave the Huntington Library a copy in the event that both the Times-Mirror and the Public Library were bombed, so that the plain-

tiff could go ahead and print its paper. It was not done to increase the circulation at all. It was not done to increase the earning capacity of The Times-Mirror. It did not add to the capital value of the Company at all.

The microfilming was done solely for protection. It is an ordinary and necessary business expense and small in comparison with the expenses of this Company of over eight million dollars in each of the calendar years of 1943 and 1944.

It has been, if your Honor please, an ordinary and necessary thing for companies to preserve their records. Lawyers do it and now we have to do so by making so many copies. All of that is ordinary and necessary. Copies have to be made for the State and Federal Governments. We have to do it because the Government says that we must do it. I know that all lawyers do it, because the Government says so, and we have to hire a lot more of accountants, clerks and secretaries who build up records and records and records.

Then, of course, we have various records photostated and it is an ordinary and necessary expense. We do that today in connection with ordinary and necessary things. [95]

When documents are photostated, all commercial businesses treat such expenditures as an ordinary and necessary function and expense.

There is no difference between the preservation of records of current years and the preservation of records of prior years. What difference does it make if we do all the microfilming at the end of each

year or we do it for 12 years? The Commissioner of Internal Revenue should allow the deduction.

Whether we do it by microfilming, photostating or in a number of other ways, for a current year, he allows it, and it doesn't make any difference whether we do it all in one month or do it in 12 months. And why should it make any difference if we do it for a number of years? It is all for the same purpose, and the Supreme Court has said that it isn't the amount that determines the character of the expenditure, as said in these cases where there were huge attorneys' fees paid only once in a lifetime. And the Supreme Court said that did not make any difference, that didn't make it less of an ordinary and necessary expense, because of the amount.

If your Honor please, with a threatened attack like there was, a company wants to protect its property, it wants to have something with which it can go ahead with business if it is bombed, and these people selected 3 different places for their film. It was an ordinary and necessary [96] thing to do. It would be a cruel thing to deny that deduction when the newspaper company expends that money in that way.

The evidence is uncontradicted as to why it was expended. It was done for no other purpose than that. If your Honor please, the evidence is uncontradicted that the plaintiff had its old newspapers microfilmed and copies of such microfilm placed in various places to enable it to continue its plant in operation.

It is true that when the plaintiff had the filming commenced, it wanted to get as many back copies as they could and they sought them from the State Library and they sought them from other sources, and they got some thirty thousand pages, I think one witness testified, that they didn't have, that they put in the microfilm.

However, the microfilm in so far as this Company is concerned, and I am speaking of the positive print, was used, as the testimony shows here, by only two individuals and only for a very short time. It is incomplete, because when they microfilm it in this way, it doesn't separate and they couldn't get the full thing, and it was used only to go back for a certain number of years. Since 1950 it has not been used by them. It isn't used by the public.

Mr. Bowers testified relative to when the public comes [97] in and they want to know something about it and they do not have a record in their bound volumes where it would be the easiest to obtain, then nobody could go to the microfilm. The employees know that too; they know it is difficult to get there, but they wouldn't go there; they would first go to the bound volumes. But if the public wants to get something and if they don't have that in the bound record there, they send them over to the Library or they can write in there if they want it.

Mr. Carraro said that he personally has used the positive film no more than half a dozen times a year to answer letters or inquiries which come to

him, in which case they go to the microfilm viewer, turn it on and they are answered.

If your Honor please, less than 3 per cent of the film that is down there constituted papers they got from other places, I think about 30,000 of 825,000 pages, or something like that. That doesn't make any difference in so far as increasing their earning capacity. There is no contradictory testimony here as to the reason why this was done. It has not increased the circulation and couldn't increase the circulation if they had 50 volumes. That is an obvious fact. If they have 50 volumes, how in the world could that increase their earning capacity? [98] How could that be an asset or add to the capital value of the business?

After all, taxation should be practical.

Bankers would not pay any attention to it just because of making an extra number of copies of documents in their business in one year and they would treat it as an ordinary expense.

It seems to me, if your Honor please, that it is obvious that this is just an ordinary and necessary expense, and we move for judgment on the record.

The Court: We will recess for five minutes.

(Recess.)

The Court: You may proceed, Mr. Wyshak.

Argument by Mr. Wyshak on Behalf of Defendant:

Mr. Wyshak: May it please the Court:

We submit that this question is primarily one of law since the facts are substantially uncontroverted.

The burden of proving that this expenditure resulted in a deductible expense is on the plaintiff.

The Regulation allowing for the deduction of such an expense as opposed to a capital expenditure and that Regulation which is the most pertinent is the one dealing with Repairs, one having to do with additions to the capital account, which is Section 39.23 (a)-4, and it reads as follows: [99]

“The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as expense, provided the cost of acquisition or production or the gain or loss basis of the taxpayer’s plant, equipment, or other property, as the case may be, is not increased by the amount of such expenditures. Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, should be charged against the depreciation reserve if such account is kept.”

Now, the question is whether in this case this expenditure, which clearly resulted in an asset for the useful life of more than one year, is deductible as an expense or not.

The plaintiff has submitted no evidence regarding the useful life of this property, on the assumption that the court may rule that it was a capital expenditure. We therefore submit that the Commissioner’s determination that it had a useful life of 25 years should be sustained, in the event that the

court does rule that the expenditure was a capital expenditure.

These questions cannot be decided easily. There is a [100] case which is cited in the plaintiff's memorandum which was cited in that Bemberg case cited by the plaintiff, which was one of these Board of Tax Appeals cases, the Illinois Merchants Trust Co. case, 4 B.T.A. 103, which has more or less set forth a rule to be used, to be weighed in such determinations. That case, at page 106 in 4 B.T.A., states:

“To repair is to restore to a sound state or to mend, while a replacement connotes a substitution. A repair is an expenditure for the purpose of keeping the property in an ordinarily efficient operating condition. It does not add to the value of the property, nor does it appreciably prolong its life. It merely keeps the property in an operating condition over its probable useful life for the uses for which it was acquired. Expenditures for that purpose are distinguishable from those for replacements, alterations, improvements or additions which prolong the life of the property, increase its value, or make it adaptable to a different use. The one is a maintenance charge, while the others are additions to capital investment which should not be applied against current earnings.”

In this case the expenditure for the microfilm was in order to acquire an asset which could replace the library [101] when there is call for back editions of the newspaper. There has been testimony that it has been used to some extent.

I submit that on the whole it is immaterial as to what use that was put to in the subsequent years.

It shouldn't make any difference whether this was a newspaper, publisher or a bank, or any other industrial corporation that decided to microfilm its records in the event of destruction for one reason or other.

We further submit that the amount is material, and I believe that counsel for plaintiff agreed with me in his argument that the amount of the expenditure is immaterial. He points out that it was only \$76,000.00 as compared to expenditures of over \$8,000,000 in one year's operations of the Times-Mirror.

I don't think that there is any question but that the trucks the Times purchases, which I am sure don't cost over 3 or 4 thousand dollars apiece, have to be depreciated.

Here we have an expenditure of almost 20 times that amount, which he says is a drop in the bucket as compared to what they expend during the year.

I submit that the amount is material.

A comparable situation arose in a First Circuit case, the Russell Box Company case, a 1953 case.

The Court: Is it cited in your memorandum?

Mr. Wyshak: I don't think it is, your Honor. I have the Commerce Clearing House report. It is cited in 54-1 USTC, paragraph 9126. It is a December, 1953 decision of the First Circuit, involving a fence which was constructed around a plant. The first question in that case was whether the cost of erecting this fence was a capital expenditure or an

expense, and I should like to read from that opinion the court's remarks:—

“The fence in question was a substantial steel structure designed to keep out intruders, and although on two sides of the property it supplanted an old out of repair wooden fence, it cannot possibly be regarded as *pro tanto* a repair of the old fence. It was clearly a new structure, and the taxpayer does not establish its claim for deduction in one year either by showing that it planned to tear the fence down as soon as the war emergency was over, and did so, or that the fence impeded access to the building and so in the long run did not enhance the value of the property. Perhaps the fence was a nuisance, but it was nevertheless erected to serve the definite purpose of protecting the property, and it served its purpose thereby increasing the value of the property for war work for a matter of years. The fence may have [103] had only a short useful life, but that does not prove that it was not a capital improvement while it lasted.”

I think the analogy is quite close, your Honor. Then, assuming for the sake of argument only that this microfilm was useful only while World War II was in effect, it still did serve the purpose during the years while the war was in effect.

I believe that Mr. Bowers testified that he was concerned and felt that the purpose of the micro-filming was in the event of a bombing. No evidence was submitted, no directors' resolutions were introduced as to the intent or the purpose as considered

by the person who ultimately made the decision that those records should be microfilmed.

In the years subsequent to the years in question, the negatives of the microfilm were used in order to make copies of the Times library for various colleges and libraries. We submit that this was in the nature of a good will expenditure which is clearly not deductible, and that it further evidences the fact that the microfilming did serve an additional purpose, in addition to protecting the Times library.

We feel that an analogy can be made that the microfilm which was distributed to the Huntington Library and to the Los Angeles Library did in effect prolong the life of the [104] records of the Times, in view of Mr. Bowers' testimony that they referred the public to the Los Angeles Library when a person came to examine a prior edition of the Times.

I believe that the Bemberg case which has been cited in the plaintiff's memorandum is distinguishable on the basis of the findings of fact there made by the Tax Court. In that case the Tax Court said that:

“The purpose was not to improve, better, extend, or increase the original plant, nor to prolong its original useful life. Its continued operation was endangered; the purpose of the expenditures was to enable petitioner to continue the plant in operation not on any new or better scale, but on the same scale and, so far as possible, as efficiently as it had operated before. The purpose was not to rebuild

or replace the plant in whole, or in part, but to keep the same plant as it was and where it was.”

In this case, the microfilming was clearly a replacement of the library of the Times in the event that something should happen to its original paper-bound editions, and we submit, your Honor, that this expenditure resulted in a capital expenditure which can only be recovered in tax benefits derived from depreciating it over a 25-year period. [105]

The Court: Counsel, how do you justify the Commissioner's distinction between the microfilming of those records of past years and the microfilming periodically of current papers?

Mr. Wyshak: Well, your Honor, my opinion is purely a personal opinion. Who wrote that T.C. ruling I don't know, and it is fairly short without citation of authority. It would seem to me that the rule there adopted with respect to current records is a rule of practicality.

First of all, assuming the current microfilming would be capitalized and tax benefit derived from a depreciation deduction, this would be a situation which would run into complications as a matter of figuring, and in view of the fact that each year there would be current microfilming, the net result is substantially the same; instead of saying that each year's microfilming had to be deducted over a 25-year period, after a while the total depreciation deductions would equal the deductions for the current years microfilming.

But I feel that it is probably a rule which allows for administrative feasibility, such as I am sure

the agents allow on small items which have a useful life of more than one year, allowing them to be expended because of the complications and work entailed and the small amounts which would be involved in depreciating them. [106]

The Court: Of course, this is no small item.

Mr. Wyshak: That is correct, your Honor.

The Court: And in a few years, it will cost more than the cost of microfilming those records prior to 1942. In other words, over that period of time it is likely to be a bigger item than the one involving the records prior to 1942.

Mr. Wyshak: That is right.

The Court: I do not get the basis for the distinction, but I take it that it would be your position and the Commissioner's position that instead of the practice of microfilming each month, if they microfilmed once a year, that would be allowed as a deduction.

Mr. Wyshak: I should think so, your Honor.

The Court: How about it if they microfilmed once every two years?

Mr. Wyshak: Well, I believe that the rule is such because of the current recurring nature of it. A Tax Court case I recently ran across might be considered as some analogy. An individual had apparently replaced one of his secretaries by a recording device and sought to deduct the cost of the device as an expense, by saying "Well, the salary I paid the stenographer would be deductible, and the cost of the recording device to replace the stenographer would naturally be deductible [107] as an ex-

pense." And the court there held that he had to recover the tax benefit for the cost of that machine through depreciation deduction.

So it doesn't necessarily follow that because you allow a current deduction of one nature, a replacement of some sort would have to be accorded the same tax treatment.

The Court: Of course, the thing that bothers me is that if it is an ordinary and necessary business expense in the conduct of their business to have microfilm of the current papers, if it is correct to say that that is an ordinary and necessary expense of doing business, then why isn't it an ordinary and necessary expense of doing business for them to have them microfilmed for the last year and the year before?

Mr. Mackay: Certainly.

Mr. Wyshak: Well, I think that "ordinary and necessary" language doesn't necessarily mean that it can be deducted in one year. I think similarly that the "ordinary and necessary" language can be carried over to a capital expenditure.

The Court: Well, if it was an ordinary and necessary expense of the business, then it is not a capital expenditure, is it?

Mr. Wyshak: Well, if it is an expense, that is correct, [108] your Honor, but I am saying that you can apply that "ordinary and necessary" language to the capital expenditure, if it is deductible at all.

The Court: The Commissioner says that this is an ordinary and necessary expense in the conduct

of the business of the Times-Mirror, that is, the microfilming of this month's and last month's newspapers is an ordinary and necessary expense of their doing business.

Now, my question is this: I want to know, if that is true, why isn't the microfilming of last year's newspapers an ordinary and necessary expense of their doing business? If they need the microfilm for this year, why wouldn't they need them for last year?

Mr. Wyshak: Well, I will have to confess, your Honor, that I agree with you to this extent: As you said, it is true. I personally disagreed with the Commissioner's ruling that the expense of making the microfilm of current issues is deductible as an expense. I think it can be analogized with the trucks again. They have to buy trucks every year. The trucks are wearing out all the time. They can't deduct the cost of those trucks as an expense, although they are clearly ordinary and necessary in the operation of their business. These trucks have a useful life of more than one year.

I feel that the microfilm has a life of more than one [109] year and I think that its cost should be capitalized for current years and that the prior years' costs of the microfilming should be capitalized.

I think the main reasoning in the ruling which states that the cost of the current year's microfilming can be deducted as a business expense is a rule of reason and nothing else, but I go along with your Honor, to be consistent, that if the prior years'

microfilming should be capitalized so should the current year's microfilming be capitalized, because this microfilm has a life of more than one year.

The Court: I assume that this is not an isolated case. I would assume that during the War there were many newspapers throughout the country that probably microfilmed their libraries, and I also assume that because you haven't cited any cases like this to me, this is probably the first one that has reached the courts.

Mr. Wyshak: That is correct, your Honor. Off the record, the Agents did canvass several newspapers in the area and couldn't come to any definitive answer on it.

The Court: What do you mean by that?

Mr. Wyshak: What I mean is, in order to determine the tax treatment accorded to other newspapers, and I recall seeing in the administrative file a memorandum to one of the Agents to see if he could determine from [110] several of the newspapers, and I believe at that time none of them had done any microfilming.

The Court: Oh, that they had not done any?

Mr. Wyshak: That they had not, that is correct, your Honor. But in this case I don't see how there is any question but that the expenditure is for a useful asset with a useful life of more than one year.

The Court: Well, the Commissioner made this ruling in 1945.

Mr. Mackay: That is right.

The Court: He didn't make it just at the time he did because of this microfilming in this case?

Mr. Wyshak: Not that I know of, your Honor.

The Court: I assume that he made the ruling to cover newspapers in general. I assume that a practice had been adopted during the War to microfilm libraries and I assume that you must have had other actions before which were similar to this. Is that right?

Mr. Wyshak: I don't know of any, your Honor.

The Court: At any rate, they are of no help to us there, because I am sure that if any of them had ever reached the courts, they would have been submitted to me.

I also assume that neither counsel could be of any further help to the court in so far as submitting any additional authorities are concerned.

Mr. Mackay: I think that is right, your Honor.

The Court: You have both submitted authorities and there are not any more of them?

Mr. Mackay: There are no more.

Mr. Wyshak: I think you are right. The only additional one I have is the Russell Box Company case which I think is quite appropriate.

The Court: What was that citation again?

Mr. Wyshak: Russell Box Company, et al. vs. Commissioner, a First Circuit case. The decision is dated December 23, 1953. It is cited in 54-1 C.C.H., paragraph 9126.

The Court: Cited where?

Mr. Wyshak: In Commerce Clearing House Federal Tax Reporter. I am sure I can locate a Federal

(2nd) citation for you, your Honor. It is cited in 54-1 USTC, paragraph 9126.

The Court: 54-1, paragraph what?

Mr. Wyshak: Paragraph 9126.

The Court: All right, if you find a Federal (2nd) citation of it, will you submit it to me?

Mr. Wyshak: I shall do that, your Honor.

Mr. Mackay: I should like to make this observation about that last case counsel cited. It seems to me that there is a tremendous difference between the tax in that case and in this one. There it was decided that it was [112] capital improvement to land or property, but here we have the situation of where all this taxpayer is doing is trying to preserve its records, and that has been going on ever since the plaintiff started to do business.

And I agree with your Honor 100 per cent. I think it is right that the Commissioner himself has ruled that current filming is an ordinary and necessary expense whether it is all done monthly or whether it is done at the end of a year or what not, for purposes exactly the same, which is to perpetuate its records for future use, but, notwithstanding the fact that he says that are deductible as ordinary and necessary expenses for current years, there can be no difference between microfilming 12 months back in one year or for 2 or 3 or 4 years, or to wherever it goes back, the purpose is exactly the same, and it is ordinary and necessary expense.

We submit it, your Honor, and ask for judgment.

Just a moment, please, If your Honor please, I would like to make this observation:

The Court: All right.

Mr. Mackay: We have made inquiries all over the country. So far as I know, this is a unique case. We know there is none in the courts. We think this is a unique case, and I really believe from the investigation that we have made, and I can't say it with any more effect [113] than what counsel says he saw in the report he mentioned, that perhaps we are the only case in which the Commissioner ever tried to disallow the deduction, and that is the information we got from the people that we have talked with about it, and I think it is unique.

The Court: Well, of course it may be unique in that you have heard of or know of no other case, but that may be because there has not been any microfilming by any other newspaper companies, in other words, the plaintiff is the only one that has microfilmed its newspapers. It doesn't seem to me that that would have been likely, that it would have been the only newspaper concern to do any microfilming of their library. Of course, as you say, it may be because the Commissioner hasn't disallowed it in the case of other newspapers. It would be just as likely that no one else tried to claim the deduction for expense after it was disallowed.

Mr. Wyshak: The Agent advises me that that is true, your Honor.

The Court: Well, of course I can't pay much attention to either side in that respect, unless you give me something more concrete.

It will be taken under submission.

Counsel, when this case is decided, the clerk will advise you that the judgment will be for the plaintiff or [114] for the defendant. Then of course I will expect counsel to proceed under 7 (h), on computations; in other words, you will either agree or submit computations.

Mr. Mackay: We will, your Honor.

The Court: All right.

[Endorsed]: Filed October 25, 1954.

[Endorsed]: No. 14582. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Times-Mirror Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14582

UNITED STATES OF AMERICA,
Appellant,

vs.

THE TIMES-MIRROR COMPANY,
Appellee.

APPELLANT'S STATEMENT OF POINTS

Pursuant to the provisions of Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant hereby adopts its Statement of Points on Appeal, which was filed in the District Court, as its statement of the points upon which it intends to rely in this Court.

Dated: This 19th day of November, 1954.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U. S. Attorney
Chief, Tax Division

ROBERT H. WYSHAK,
Assistant U. S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Appellant

[Endorsed]: Filed November 22, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Pursuant to Rule 17 (6) of this Court, appellant hereby designates the following parts of the record as being necessary for consideration of the points upon which it intends to rely on this appeal, and desires to have printed, omitting the title of Court and cause from each of the documents designated for printing:

(1) The complete record, certified by the Clerk of the District Court to the Court of Appeals except that only the following portions of the reporter's transcript of proceedings on June 17, 1954, are to be included: commencing on page 9, line 3, beginning, "Q. Mr. Bowers, where do you reside?" through page 92, line 3, ending: "A. No, I didn't tell him that statement."

(2) The District Court Clerk's certification of Record on Appeal;

(3) This Designation of Record Necessary for Consideration on Appeal and to be Printed; and

(4) Statement of Points Upon Which Appellant Intends to Rely on Appeal. (Court of Appeals.)

Dated: This 19th day of November, 1954.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U. S. Attorney
Chief, Tax Division

ROBERT H. WYSHAK,
Assistant U. S. Attorney
/s/ ROBERT H. WYSHAK,
Attorneys for Appellant

[Endorsed]: Filed November 22, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD

Appellee hereby designates for inclusion in the
printed record: from page 92 (commencing at line
4) to and including page 115 of the reporter's tran-
script of proceedings; and this Designation.

Dated this 2nd day of December, 1954.

MACKAY, McGREGOR, REYNOLDS
& BENNION,

/s/ By A. CALDER MACKAY,

/s/ By ADAM Y. BENNION,
Attorneys for Appellee

[Endorsed]: Filed December 3, 1954. Paul P.
O'Brien, Clerk.



ROBERT H. WYSHAK,
Assistant U. S. Attorney
/s/ ROBERT H. WYSHAK,
Attorneys for Appellant

[Endorsed]: Filed November 22, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD

Appellee hereby designates for inclusion in the
printed record: from page 92 (commencing at line
4) to and including page 115 of the reporter's tran-
script of proceedings; and this Designation.

Dated this 2nd day of December, 1954.

MACKAY, McGREGOR, REYNOLDS
& BENNION,

/s/ By A. CALDER MACKAY,

/s/ By ADAM Y. BENNION,
Attorneys for Appellee

[Endorsed]: Filed December 3, 1954. Paul P.
O'Brien, Clerk.

